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82-1860

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SCHNEIDER MOVING & STORAGE COMPANY,
Petitioner,

v.

LORAN W. ROBBINS, MARION N. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD MCDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States and Southeast and Southwest Areas Pension Fund, a pension trust,
Respondents,

and

LORAN W. ROBBINS, MARION N. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD MCDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States and Southeast and Southwest Areas Health and Welfare Fund, a health and welfare trust,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

The sole question presented is:

May the Trustees of employee welfare and pension trusts, which have been established as third-party beneficiaries of collective bargaining agreements between employers and labor unions under §302(c) of the Taft-Hartley Act (29 U.S.C. §186(c)), file suit against an employer for allegedly delinquent contributions before exhaustion of the grievance and arbitration procedure under the agreements, where:

1. There is an underlying question of coverage requiring interpretation of the collective bargaining agreement, and

2. The collective bargaining agreement requires that such questions be resolved through the grievance and arbitration procedure of the agreement.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner Schneider Moving & Storage Company[1] respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 16, 1983.

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[1] Prosser Moving and Storage Company has also filed a petition for certiorari in a different but related case.

OPINION BELOW

The opinions of the Court of Appeals (*Robbins, et al.* v. *Schneider Moving & Storage Company*, 673 F.2d 246 (8th Cir. 1982) and *Robbins, et al.* v. *Schneider Moving & Storage Company*, 700 F.2d 433 (8th Cir. *en banc* 1983)) are contained in Appendixs B and C attached hereto. The Memorandum and Order of the District Court for the Eastern District of Missouri appears in Appendix A attached hereto.

JURISDICTION

Judgment of the Court of Appeals for the Eighth Circuit was entered on March 24, 1982. A timely Petition for Rehearing en banc was granted on June 4, 1982. The judgment of the Court of Appeals for the Eighth Circuit, *en banc*, was entered on February 16, 1983, and this Petition for Certiorari has been filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Trustees of the Central States Health and Welfare and Pension Funds (hereinafter referred to as "Trustees") brought suit on April 21, 1980, against Schneider Moving & Storage Company ("Schneider") alleging that Schneider had been a party to a series of collective bargaining agreements with Teamsters Local Union 610 and that under those collective bargaining agreements it was required to make contributions to the funds on behalf of "each employee covered by said agreement." (See Appendix D) Suit was filed in the United States District Court for the Eastern District of Missouri. Jurisdiction was alleged under Section 301(a) of the Labor Management Relations Act of 1947 as amended (29 U.S.C. §185(a)); and Section 502 of the Employee Retirement Security Act of 1974 (29 U.S.C. §1132). Scneider moved to dismiss on the ground that the collective bargaining agreements provided that it was obligated to make contributions to the funds on behalf of "each

regular employee" and not on behalf of all of its employees. Schneider moved to dismiss on the ground that the District Court lacked jurisdiction over the subject matter because the dispute required an interpretation of the collective bargaining agreement to determine which types of employees were covered by Schneider's obligation to contribute to the Fund—a "coverage" issue. Schneider contended that it and the union representing its employees had contractually agreed that such issues would be raised and resolved through the grievance and arbitration procedure contained in the collective bargaining agreement and, therefore, the Court lacked subject matter jurisdiction over the Complaint. The union had not claimed that certain types of employees, i.e., casuals, part-time, temporary, extra, seasonal and emergency, were covered by Schneider's obligation to contribute. Therefore, Schneider argued that unless and until the union raised the issue of coverage under the contractual grievance and arbitration procedure by contending that Schneider had not made required contributions, the Trustees could not bring suit to collect contributions allegedly due from Schneider for these employees.

On November 17, 1980, the Honorable John K. Regan, Senior District Judge, granted Schneider's Motion to Dismiss.

The District Court held that the claims asserted in the Complaint against Schneider could not be characterized as a simple collection matter. The Court found that the underlying dispute was one involving construction and interpretation of contract language and that therefore the issues fell within the scope of the grievance and arbitration clause of the collective bargaining agreement.

The Trustees appealed the decision of the District court to the United States Court of Appeals for the Eighth Circuit. On March 24, 1982, the Court of Appeals reversed the decision of the District Court and remanded the case for further proceedings.

On April 7, 1982, Schneider filed its Petition for Rehearing *en banc* in the United States Court of Appeals for the Eighth Circuit. The Court of Appeals granted Schneider's Petition for Rehearing *en banc*.

On February 16, 1983, in a six to two decision, the Eighth Circuit Court of Appeals, while noting a conflict among the Circuits, overruled the District Court and several prior decisions of the Eighth Circuit and remanded the case for further proceedings.

REASONS FOR GRANTING THE WRIT

This Is A Case Of First Impression Involving Important Questions Of Federal Labor Law, National Labor Policy, And Employee Benefit Law. The Decision Below Is In Direct Conflict With Decisions Of Three Other United States Courts Of Appeals And With Federal Labor Law, National Labor Policy, And Employee Benefits Law Favoring Arbitration As A Method Of Resolving Disputes.

Introduction

The decision below, by the Court *en banc* is one of first impression in the United States Supreme Court. The case presents an important question involving Federal labor law, national labor policy and employee benefits law. This question is: May the Trustees of employee welfare and pension trusts, which have been established as third-party beneficiaries of collective bargaining agreements between employers and labor unions under §302(c) of the Taft-Hartley Act (29 U.S.C. §186(c)), file suit against an employer for allegedly delinquent contributions before exhaustion of the contractual grievance and arbitration procedure, where:

1. There is an underlying question of coverage requiring interpretation of the collective bargaining agreement, and

2. The collective bargaining agreement requires that such questions be resolved through the grievance and arbitration procedure of that agreement.

The decision below conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980). The decision also conflicts with the decision of the United States Court of Appeals for the Sixth Circuit in *Central States Southeast and Southwest Areas Pension Fund, et al.* v. *Central Transport, Inc., et al.*, 698 F.2d 802 (6th Cir. 1983). Finally, the decision

below conflicts with the decision of the United States Court of Appeals for the Fourth Circuit in *Trustees of National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Health Center,* 669 F.2d 212 (4th Cir. 1982).

The decision below also conflicts with national labor policy which favors arbitration as the preferred means of resolving disputes involving collective bargaining agreement interpretation questions. This policy was enunciated in the Steelworkers Trilogy: *United Steelworkers* v. *Enterprise Wheel and Car Corporation,* 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior and Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers* v. *American Manufacturing Co.,* 363 U.S. 564 (1960).

This policy is also reflected in §302(c) of the Taft-Hartley Act (29 U.S.C. §186(c)) which requires that arbitration be used to resolve deadlocks between trustees of multiemployer employee benefit plans such as those involved in this case.

Finally, the decision below conflicts with the national policy relating to employee benefit law that requires arbitration for the resolution of disputes involving the liability of employers for withdrawing from multiemployer pension plans. See §4221 of the Employee Retirement Income Security Act of 1974 as amended by the Multiemployer Pension Plan Amendment Act of 1980 (29 U.S.C. §1401).

Discussion of Conflicts

The Seventh Circuit Court of Appeals ruled on the precise issue before the Court in the present case. In *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin, Inc.,* 625 F.2d 171 (7th Cir. 1980), the language contained in the collective bargaining agreements was nearly identical to the language in this case. There, as here, the funds filed a collection suit against the employer seeking contributions claimed to be owed under the terms of the collective bargaining agreement. The employer moved to dismiss, alleging absence of subject

matter jurisdiction because the arbitration provisions contained in the collective bargaining agreement had not been exhausted. The District Court granted the motion to dismiss and the Seventh Circuit Court of Appeals affirmed, ruling that:

> We agree with the Funds, as does Martin, that the Funds are not required to arbitrate disputes over delinquent payments. However, Judge Nolan was correct in finding that this is not a simple collection case, but a case turning on which, if any, of the disputed workers were covered by the contract. Until that question is resolved, it is impossible to determine whether there is any delinquency on which to base a collection action under Articles 60 and 61. The parties to the contract clearly intended, as reflected in their inclusion of Article 8, that such questions of contract interpretation be resolved by arbitration.

Central States, Southeast and Southwest Areas Pension Fund v. *Howard Martin, Inc.*, 625 F.2d at 172. The Funds argued that they had no access to the arbitration process. The Court answered that:

> The argument falls of its own weight, however. To trigger the arbitration process, the Funds need only inform the Union, the members of which the Funds exist to serve, that Martin disputes the coverage of certain workers and ask the Union, the organization of primary interest, to file a grievance against Martin.

625 F.2d at 173.

The Fourth Circuit had occasion to address this same issue in *Trustees of National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Health Center*, 669 F.2d 213 (4th Cir. 1982). In *Constant Care*, the Court of Appeals reversed the District Court's dismissal of the Funds' complaint. The Court adopted the reasoning of *Howard Martin*, but ruled that the case before it was a mere collection case to which

no substantive defenses had been asserted by the employer. The Court, quoting Judge Nolan in *Howard Martin,* stated that where the case involves a dispute arising out of an interpretation of the contract and the contract calls for arbitration of such disputes, the case must first be submitted to arbitration.

The Court went on to hold that:

> As the quoted passage from Howard Martin discloses, the rationale of that decision was that the case was not a simple collection matter; rather, there was an underlyng question of contractual interpretation warranting arbitration which was a prerequisite to collection.

Trustees of National Benefit Fund for Hospital and Health Care Employees v. *Constant Care Community Health Center,* 669 F.2d at 215.

In *Central States, Southeast and Southwest Areas Pension Fund, et al.* v. *Central Transport, Inc., et al.,* 698 F.2d 802 (6th Cir. 1983), the Trustees brought suit seeking a preliminary injunction to require the employer to provide the funds with certain information with respect to all the employees of the employer. The Sixth Circuit Court of Appeals held that neither ERISA's statutory disclosure provisions nor contractual provisions entitled the funds to conduct such a broad inspection of records. The Court held that there was a limited right to inspect employee records, which was limited to "factual situations in which the Trustees have reasonable cause to believe that a particular person is covered by a collective bargaining agreement but has not been placed on the Union seniority list or otherwise classified by Transport or the Union as a covered employee." *Central States Southeast and Southwest Areas Pension Fund, et al.* v. *Central Transport. Inc., et al.,* 698 F.2d at 811.

The Court in so holding described the means by which the status of a group of employees ("covered" or "non-covered") was to be determined. The Court held that:

> Entitlement to Funds' benefits may be established by a concession amongst the parties that a particular individual is a covered employee or person otherwise entitled to the Funds' benefits. Entitlement may also be established by the judicial or arbitral process where there is no concession that an employee, or one claiming under him or her, is a covered employee.

Central States Southeast and Southwest Areas Pension Fund, et al. v. *Central Transport, Inc., et al.*, 698 F.2d at 811.

The clear holding of the Court is that where the collective bargaining agreement dictates the method of determining coverage, that method must be followed in order to determine whether a particular employee or group of employees is in fact "covered." The entire import of the Sixth Circuit's decision in *Central Transport, Inc.*, is that the Trustees are bound by the terms of the collective bargaining agreement which created the funds so long as they are consistent with the statute.

In this case the collective bargaining agreement in Article VI (see Appendix D) requires that disputes as to the meaning or application of the provisions of the collective bargaining agreement be arbitrated.

To summarize the above, prior to the decision of the Court below, all of the Court of Appeals which had ruled on this issue had ruled that where there is a genuine dispute involving the interpretation of the terms of the collective bargaining agreement, such dispute must be decided by arbitration, prior to any action to collect such contributions. The rationale for all these decisions was that no right to collection can be determined by a Court contrary to the terms of the document that created that right. The Courts rightly recognized that where the existence of the obligation to make certain payments *depends* upon the interpretation of the collective bargaining agreement and the collective bargaining agreement specifically requires arbitration on questions of interpretation, the Court must defer to arbitration.

The Court below relied on several cases which have little relevance to the present case. The Court relied heavily on *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459 (1960). In that case the Supreme Court held that an employer could not set off against a third-party beneficiary welfare fund, a claim the employer had against the union. In reaching its decision the Court observed that a welfare and retirement plan established under §302(c) of the Taft-Hartley Act was not a typical third-party beneficiary. The case is clearly and significantly distinguishable. As stated in *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171, 172 (7th Cir. 1980):

> In Lewis, however, the employer's liability for payments to the Fund was conceded, the case dealt with the employer's claimed right to withhold payments and setoffs of damages, and no arbitration clause was present in the contract or discussed by the Court. Whether the Funds' special third party status would require a specific provision entitling an employer to set off payments admittedly owed is irrelevant here, where the existence of the obligation to make certain payments depends upon the interpretation of the contract and the contract specifically requires arbitration on questions of interpretation.

Thus, in *Lewis*, there was no underlying contract dispute and no mention of any arbitration clause. Therefore, the *Lewis* case has no applicability here.

The Court below also relied on §515 of ERISA (29 U.S.C. §1145) and its legislative history. That section provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Regarding §515, the Court quoted from *Kaiser Steel Corporation* v. *Mullins*, 455 U.S. 72 (1982).

> The provision which was eventually enacted as [§515] was added to S. 1076 by the Senate Committee on Labor and Human Resources. The Committee explained that the provision was added because "simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to the contributions," and steps must be taken to "simplify delinquency collection." Senate Committee on Labor and Human Resources, S. 1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess., 44 (Comm. Print Apr. 1980) (1980 Senate Labor Committee Print) (emphasis added). During floor debate, Senator Williams and Representative Thompson explained the purpose and meaning of [§515] in the same language used in the Senate Labor Committee Print.

Kaiser Steel Corporation v. *Mullins*, 455 U.S. at 87.

The Court below went on to state that the reference to "simple collection actions" in the legislative history is striking in light of the *Howard Martin* court's use of the same phrase. However, *Howard Martin* was rendered after the legislative history was written. §515 was not enacted in response to *Howard Martin*. In addition, it is clear that the arbitration procedure to be used in resolving coverage disputes is perfectly consistent with and supportive of §515 of ERISA. By requiring that coverage disputes be subjected to arbitration, the true collection actions would be just that—collection actions, and not long-winded and complex interpretations of collective bargaining agreements. By following the contractual provisions set forth, the coverage disputes would be resolved before any court would become involved. In fact, the Court of Appeal's reliance on

§515 is totally incongruous with the rest of the decision. By allowing funds to litigate the coverage issues in court without exhaustion of the contractual arbitration procedure, the federal courts will be burdening themselves with questions of contract interpretation. There will be no such thing as a simple collection action; there will only be the "lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions"—just the problem §515 is intended to eliminate.

The decision reached is also contrary to the national labor policy strongly favoring arbitration, as articulated in the Steelworkers Trilogy. See *United Steelworkers* v. *Enterprise Wheel and Car Corporation,* 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior and Gulf Navigation Company,* 363 U.S. 574 (1960); *United Steelworkers* v. *American Manufacturing Company,* 363 U.S. 564 (1960). As Judge Henley stated in his dissenting opinion to the panel decision of the Court of Appeals in this case:

> Because I find it clear that arbitration here would promote the national labor policies of maintaining industrial peace, avoiding delay, and deferring to the expertise of persons well acquainted with the standards of the industry and the law of the shop, and because I think deferral to arbitration would not significantly undermine the independence of the Trustees, I would affirm the judgment of the district court.

(Appendix B) (Panel Op. page A-15). *See also, IBEW Local No. 308* v. *Dave's Electric Service, Inc.,* 382 F.Supp. 427 (M.D. Fla. 1974).

The majority in the panel below stated that they were aware that allowing the District court to interpret the provisions of the collective bargaining agreement might lead to a lack of uniformity in interpretation of the bargaining agreements. They also stated that such a danger would be "minimal." (Panel Op. page A-14) (Appendix B) This raises a very important question.

Schneider, of course, is greatly concerned that litigating coverage issues with the Trustees, when the Union has not raised these issues could result in Schneider being compelled to make payment to the Trustees in excess of the obligation it assumed. To compel Schneider to litigate this issue is far beyond its expectations and contrary to its agreement. The other side of the coin is that Schneider could be bound to less than what it originally believed its contractual obligation to be. In that case, it would not be Schneider, but the beneficiaries of the plans who would suffer. Litigating the interpretation and construction of the contract without the presence of the union poses many possibilities. The Union could not join in any action with the Trustees in federal court because the Union would first have to arbitrate the subject dispute under the contractual arbitration procedure. The employees could not join in the dispute because they agreed to bargain and resolve disputes through the Union. If the employees were allowed to join in the suit, the collective bargaining system would be circumvented and undermined.

The Court of Appeals opinion states that:

> The Union may choose to assist the funds by invoking [the arbitration] process. Our holding in no way obstructs that alternative avenue of redress. Nor need we decide in the cases before us now to accommodate the judicial and arbitral processes and their results if both are invoked with respect to the same pension or welfare claim.

(Op. page A-37). (Appendix C) The Court below notes, in footnote 9, that "[t]here may be some danger that courts will interpret agreements in a way different from arbitrators."

The opinion of the Court below seems to scoff at the danger that there will be conflicting decisions. It first states that the Union may decide to assist the funds by invoking the arbitration process but allows the funds to refuse to participate in that process. This Court should consider the implications of this decision in a case where the Union seeks arbitration on a given

coverage point but where the fund refuses to go along and instead files suit with respect to the same coverage issue. If both tribunals decided the issue the same way, there would be no problem. However, if the tribunals' decisions differed, which would prevail? If the Court's decision prevailed, the policy favoring arbitration in the national labor policy would be undermined. If the arbitrator's decision prevailed, the whole exercise of allowing the Trustees to litigate instead of compelling them to arbitrate as they are contractually required to do, would be defeated. If neither decision prevailed, the employer would have inconsistent obligations under the same contract with respect to the same employees.

Thus, the decision by the Court of Appeals in this case is frought with dangers and it is doubtful that either employers or unions that are party to collective bargaining agreements would be willing to call these dangers minimal.

The Court of Appeals overruled three well-reasoned decisions of the panels of the Eighth Circuit, *Layne-Western Co., Inc.* v. *International Union of Operating Engineers,* 650 F.2d 155 (8th Cir. 1981); *Farmer* v. *Fisher,* 586 F.2d 1226 (8th Cir. 1978); and *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST,* 641 F.2d 616 (8th Cir. 1981). In doing so, the majority opinion clearly holds that underlying contractual interpretation and construction defenses may be raised in an action which is termed by the fund as a "collection action." Where an employer has a defense based on interpretation of the collective bargaining agreement, the court will have to consider that defense to determine whether the amounts allegedly due to the funds are actually due to the funds. This will be a routine defense in many cases since many "collection actions" in fact involve gray areas where coverage is or may be unclear.

the process advanced by the decision in this case clearly circumvents the national labor policy favoring arbitration and will very probably create, as discussed above, inconsistent and incongruous interpretations of collective bargaining agreements.

In addition to the foregoing, the Court of Appeals expressed concern that the independence of the Trustees would be jeopardized if exhaustion of the contractual grievance and arbitration procedure were required. However, this concern for the independence of the Trustees is not justified. The fact that arbitration would require the Trustees to rely on the union to invoke the arbitration procedure, was addressed by the Seventh Circuit in *Central States, Southeast and Southwest Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980). In that case the Court held that:

> Lastly, the Funds say they have no access to the arbitration process because Article VII of the contract provides that arbitration may be invoked "only by the authorized union representative or by the employer." The argument falls of its own weight, however. To trigger the arbitration process, the fund need only inform the Union, the members of which the Funds exist to serve, that Martin disputes the coverage of certain workers and ask the Union, the organization of primary interest, to file a grievance against Martin.

Id., 625 F.2d at 173. In addition to the foregoing, a panel of the Eighth Circuit in *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981), noted that:

> [I]t would appear that in the event a dispute should arise respecting coverage, the duty of fair representation would impel the Union to invoke the grievance machinery if the Funds were to request such action.

Id. at 618. See also Judge Henley's dissent in the decision below. (Dis. Op. pages A-37-41) (Appendix C). That same duty of fair representation would certainly extend to require the unions to invoke that machinery with due diligence for the protection of the employees' rights.

Additional protections are available to insure that the rights of the Trustees and the employees are protected. First, if there was any reasonable basis for believing that the employer failed to report any covered employee, the Secretary of Labor would have the power to make an investigation and to make available to the Trust any information resulting from the investigation. 29 U.S.C. §1134(a)(1) and (2). Second, criminal sanctions are available in the event the employer knowingly fails to disclose facts required by ERISA to be published. 18 U.S.C. §1027. Third, as stated by Judge Henley in his dissent to the panel decision in this case: "The independence of the trustees is already adequately protected by the mandates of the LMRA and ERISA." (Dis. Op. page A-40) (Appendix C).

The decision below is also directly contrary to the express policy of Congress that disputes involving the rights and obligations of those involved in multiemployer benefit plans be resolved through arbitration. This policy is clearly stated in §302(c) of the Taft-Hartley Act (29 U.S.C. §186(c)), which requires, *inter alia*, that any trust agreement establishing a joint labor-management administered employee benefit fund provide that:

> . . . in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock . . . the two groups shall agree on an impartial umpire to decide such dispute. . . .

The Congressional policy favoring arbitration as a means of resolving disputes in this area is also expressed in §4221 of the Employee Reitrement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (29 U.S.C. 1401). This section of ERISA requires that the resolution of disputes involving the liability of employers withdrawing from multiemployer pension plans be resolved through arbitration. It provides, *inter alia*,

> Sec. 4221(a)(1). Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 [relating to the determination and calculation of the withdrawal liability] shall be resolved through arbitration.

As stated by Judge Henley in his dissent to the decision of the Court below:

> Today the court makes bad law. It unnecessarily overrules three prior decisions of this court, rejects the reasoning of the Seventh Circuit in *Martin* and erodes the pronouncements of the Supreme Court in the *Steelworkers Trilogy*. Its decision may be perceived as doing disservice to the national policies of maintaining industrial peace, avoiding delay and deferring to the expertise of persons acquainted with industry standards and the law of the shop. (Dis. Op. pages A-37-38) (Appendix C)

CONCLUSION

In summary, the decision of the Court of Appeals in this case is contrary to the decision of the Fourth, Sixth and Seventh Circuits, is contrary to the weight of the law and unsupported by present law, is contrary to the national labor policy and employee benefits law and plicy, and it unnecessarily assumes that the independence of the Trustees will be jeopardized by a contrary decision. For these reasons, Petitioner Schneider Moving & Storage Company respectfully requests that the Court grant its petition for writ of certiorari to review the decision of the Court below and to resolve the conflict among the circuits with regard to this question.

Respectfully submitted,

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5/12/83

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-535C (B)

Loran W. Robbins, et al.,

Plaintiffs,

vs.

Schneider Moving and Storage Company, Inc.,

Defendant.

MEMORANDUM

(Filed November 7, 1980)

In this action, the trustees of two separate and independent trusts, as alleged third-party beneficiaries, have joined in a single count their separate claims alleging that defendant has violated the terms of three consecutive three-year collective bargaining agreements, commencing March 1, 1970, as well as certain provisions of their separate industry Trust Agreements.

In substance, it is alleged in Paragraph 10 of the complaint that "(b)y virtue of [unspecified] provisions contained in the Collective Bargaining Agreements", defendant agreed, inter alia, to furnish to the trustees of each of said Funds a monthly contribution report. In Paragraph 11 of the complaint, it is alleged in general terms that "(p)ursuant to [unspecified] provisions contained in the Collective Bargaining Agreement *and* Health and Welfare *and* Pension Trust Agreements, the Trustees acting thereunder are authorized and empowered to examine and copy the payroll books and records of an

Employer", with certain alleged consequences if "upon an audit made by the Trustees and/or upon other evidence it shall be found that an Employer had failed to make all contributions required" of said employer. Paragraph 12 alleges that defendant has violated said obligations on its part by failing to allow the Trustees "to make *proper* audit of Defendant's payroll books and records" and by failing to make the required monthly contribution reports. Plaintiffs seek specific performance of all of defendant's obligations required under all the agreements, including certain participation agreements.

By pleading their claims in one count in the foregoing manner, plaintiffs have made it extremely difficult, if not impossible, to ascertain which provision of which Agreement has allegedly been violated by defendant as to each set of plaintiff trustees. Adding to this problem, although not adverted to in the complaint, is the fact that although both claims have their genesis in the same collective bargaining agreements, the provisions relating to each Fund and contributions thereto are set forth separately, each being completely independent of the other. So, too, each of the Trust Agreements is entirely independent of and wholly unrelated to the other. We also note that without regard to the foregoing, plaintiffs have served a request for admissions which, inter alia, requested defendant to admit that by the execution in March, 1961, of a so-called "Participation Agreement" which was expressly limited to the *Pension Fund* and the *Pension Trust Agreements* defendant also agreed to be bound by the terms of the *Health and Welfare* Trust Agreements.

Defendant has moved to dismiss the action, contending that the controversy should have been submitted to arbitration. Plaintiffs argue that as third-party beneficiaries as distinguished from signatories to the Collective Bargaining Agreements they are not bound by the grievance-arbitration procedures which would be required of the union with respect to the resolution of differences.

This issue has been addressed in several cases, most recently in *Central States Southeast and Southwest Areas Pension Fund* v. *Martin*, ____ F.2d ____, 104 LRRM 3096, decided by the Court of Appeals for the Seventh Circuit on July 9, 1980, discussed infra. Plaintiffs cite some earlier district court decisions in Illinois and one in Pennsylvania (e.g. *Todd* v. *Caseworkers*, 425 F. Supp. 1375) to the effect that where the only dispute relates to how much of the required contribution is delinquent, the pension plan trustees as third-party beneficiaries are not bound to submit the dispute to arbitration. In those cases the resolution of the dispute was not dependant on the construction or interpretation of the language contained in the collective bargaining agreement. We agree that where, as in *Todd*, the action is no more than a simple collection proceeding with only the amount of the delinquency in issue, the third-party beneficiary is not required to arbitrate such dispute.

Of importance is the fact that the present is *not* a simple collection case. To the contrary, defendant points out, and plaintiffs have not denied, that whether defendant will ultimately be held liable to either or both Funds is dependent upon a construction and interpretation of the language of the collective bargaining agreements. It was on this basis that *Martin, supra,* was decided. In holding that the dispute should be submitted to arbitration, Judge Markey, for the Seventh Circuit, noted that inasmuch as the case turned on which, if any, of the disputed workers were covered by the contract, it would be impossible to determine whether there was, in fact, a delinquency on which to base a collection action.

Plaintiffs rely on *Lewis* v. *Benedict Coal Corp.*, 36 [1] (sic) U.S. 459 (1960) which held that a collective bargaining agreement establishing a welfare fund is not a typical third-party beneficiary contract, and on that basis ruled that the employer could not set off against its admitted liability to the fund the damages it sustained by reason of the *union's* breach of a no-strike agreement. No such situation is here present.

On the contrary, the issue here is simply whether the employer is liable at all *under the terms of the collective bargaining agreements.* If, upon a proper construction and interpretation of the agreements, the defendant has not agreed to make contributions on behalf of certain classes of employees, the argument that plaintiffs, as third-party beneficiaries, may attempt to collect on behalf of those employees begs the question. Surely, plaintiffs are not entitled to contributions which the employer has not agreed to make under the collective bargaining agreements. They are third-party beneficiaries *only* to the extent set forth in such agreements. In truth, the underlying controversy as to which employees are covered by the contract is actually with the *union,* and the union should not be permitted by the expedient of remaining out of the litigation, preclude the employer from obtaining a determination, through arbitration, of the proper construction of the contract language.[1]

We hold that the controversy as to the construction or interpretation of the contract language must first be submitted to arbitration. Unless that issue is resolved adversely to the employer, plaintiffs may not maintain this action on the theory they are third-party beneficiaries. Should there be any problem respecting the right of the trustees to independently invoke the arbitration provisions, the procedure suggested by *Martin* should be followed, namely, that the Trustees request the union to file a grievance and thus trigger the arbitration process.

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[1] Significantly, although the collective bargaining agreements expressly provide that a failure by the employer to pay the required contributions shall constitute a breach of the agreements, the union has taken no action. A wilful violation of such agreement, uncured after 5 days notice, entitles the union to use its economic power to enforce the contract. We further note that the agreements obligated the employer to post a list of its regular employees, so that if the union were to question the adequacy thereof, the dispute here involved would long since have been resolved by arbitration.

To make our ruling unmistakably clear - we do *not* hold that *mere* collection matters should be subject to arbitration. We add that in the event the trustees are uncertain as to whether a particular claim is a mere collection matter or one which involves a dispute as to the construction or interpretation of the language of the collective bargaining agreement, they should, before instituting suit, obtain the requisite information from the union and the employer.

It follows from the foregoing that defendant's motion to dismiss should be and it is hereby sustained. An order will be entered dismissing the case without prejudice pending the outcome of arbitration proceedings.

Dated this 7th day of November, 1980.

/s/ JOHN K. REGAN
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-535C (B)

Loran W. Robbins, et al.,

Plaintiffs,

vs.

Schneider Moving and Storage Company, Inc.,

Defendant.

ORDER OF DISMISSAL

The Court having this day entered its MEMORANDUM herein, NOW THEREFORE in accordance therewith and for the reasons therein stated,

IT IS HEREBY ORDERED that this action be and the same is hereby DISMISSED WITHOUT PREJUDICE.

Dated this 7th day of November, 1980.

/s/ JOHN K. REGAN
UNITED STATES DISTRTICT
JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-2116

Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley and R. V. Pulliam, Trustees of the Central States, Southeast and Southwest Areas Pension Fund,

Appellants,

v.

Prosser's Moving and Storage Company, a Missouri corporation,

Appellee.

No. 80-2117

Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley and R. V. Pulliam, Trustees of the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds,

Appellants,

v.

Schneider Moving and Storage Company, a Missouri corporation,

Appellee.

Appeals from the United States District Court
for the Eastern District of Missouri

Submitted: September 16, 1981

Filed: March 24, 1982

Before BRIGHT, HENLEY and ARNOLD, Circuit Judges.

PER CURIAM.

These appeals are from the district court's orders dismissing appellants' complaints without prejudice pending the outcome of arbitration proceedings. The gravamen of the complaints is that appellees have failed to accurately report and remit Benefit Fund contributions for all employees covered by various collective bargaining and other ancillary agreements which establish two employee benefit plans. The complaints also prayed, *inter alia*, for an accounting as to the hours worked and wages received by the appellees' employees in order to determine the amounts of employer contributions due to the two Funds, for payment of the amounts determined to be due the Funds, with interest, and for specific performance of the obligations undertaken by the appellees as a result of their execution of the collective bargaining and ancillary agreements.

The underlying dispute involves the interpretation of the definitions of certain classes of employees for contribution purposes. To the extent that these classes are defined, the definitions appear to be set out solely in the collective bargaining agreements.

Appellees denied the allegations contained in the complaints, and each moved to dismiss the complaints on the grounds that the district court lacks subject matter jurisdiction, and that the complaints fail to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b). The thrust of their arguments is that the Trustees have neither a statutory nor a contractual right to the prayed-for relief without prior deter-

mination of their obligations through use of the grievance-arbitration proceedures provided by the collective bargaining agreements.

The district court entered orders dismissing the complaints without prejudice pending the outcome of arbitration proceedings, and this appeal followed. We have jurisdiction over these appeals pursuant to 28 U.S.C. § 1291. *See United Steelworkers of America, AFL-CIO* v. *Black, Sivalls & Bryson, Inc.*, 608 F.2d 303, 304 (8th Cir. 1979).

After a careful examination of the nature of the complaints and of the underlying agreements, we reverse the district court's orders and remand these cases for further proceedings not inconsistent with this opinion.

Appellants are Trustees of the Central States Health and Welfare and Pension Funds. These Funds are employee benefit plans within the meaning of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* (ERISA) and the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.* (LMRA). The Funds are also common law trusts established, respectively, in 1950 and 1955 by written Trust Agreements and Declarations of Trust executed by employer groups whose member companies are engaged in the trucking industry, and by organizations composed of various local Teamsters Unions.

Appellee Schneider Moving and Storage Company (Schneider) is a Missouri corporation engaged in the business of public moving and is an employer and a party in interest in an industry affecting commerce within the meaning of ERISA and the LMRA. From March 1, 1970 through February 28, 1979, Schneider was a party to three successive Master Agreements executed by the Public Movers' Association of Greater St. Louis and Local Union 610 (the Union), affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. In addition, Schneider executed a "Joint Application" and a "Participation Agreement" as re-

quired by the collective bargaining agreements. By executing these documents, Schneider agreed to make contributions to the Health and Welfare Fund, and to the Pension Fund.

In February of 1979, a decertification election was held, and the Union was described as the representative of Schneider's employees.

Appellee Prosser's Moving and Storage Company (Prosser) is a Missouri corporation engaged in the business of public moving, and is likewise an employer and a party in interest in an industry affecting commerce within the meaning of ERISA and the LMRA. From March 1, 1976 through February 28, 1979, Prosser, like Schneider, was a party to a collective bargaining agreement. Prosser also executed a Participation Agreement, whereby it agreed to make contributions to the Pension Fund as required by the collective bargaining agreement. Furthermore, on or about March 1, 1979, Prosser entered into another collective bargaining agreement with the Union, to be effective through February 28, 1982.

The collective bargaining agreements mentioned above provide the definitions whereby a particular employee's eligibility for coverage is determined, and delineate the annual amounts to be contributed by each employer to the Funds on behalf of each of their covered employees. The health and welfare and pension provisions of these agreements further provide that the employer, by executing the agreements, authorizes the execution of the Trust Agreements necessary for the administration of the Funds, and ratifies the actions taken by the Fund Trustees within the scope of their authority.

The collective bargaining agreements also provide a grievance-arbitration mechanism "should differences arise between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of the Agreement." This mechanism gives the Union the discretion to invoke the grievance-arbitration procedures provided by the

agreements, to do nothing, or to use its economic power five days after giving written notice to the employer.

With the exception of the 1979-1982 Collective Bargaining Agreement with Prosser, the agreements do not give the employers the right to invoke the grievance-arbitration procedures in the event of a dispute involving the Funds. The 1979-1982 Collective Bargaining Agreement with Prosser does allow Prosser to request arbitration. In such circumstances, the Union must submit to arbitration and may not resort to economic action unless the dispute to be arbitrated involves Prosser's failure to make contributions to the Funds.

By executing the Participation Agreements, Prosser and Schneider agreed to make contributions to the Pension Fund as required by the collective bargaining agreements. Appellees also agreed to abide by the terms of the Pension Fund Trust Agreement, and to abide by the rules and regulations adopted by the Trustees of the Fund, and by the actions of the Trustees in administering the Fund in accordance with the rules and with the Pension Fund Trust Agreement.

By executing the Joint Application, Schneider made essentially the same agreements with respect to the Health and Welfare Fund.[1]

The Trust Agreements require the employers to remit payments to the Funds in accordance with the terms of the collective bargaining agreements. Among other things, the Trust Agreements authorize the Trustees to promulgate such rules as

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[1] It does not appear that Prosser executed a Joint Application. Prosser concedes, however, that the two trust indentures were incorporated by reference into the collective bargaining agreements that it executed, and that by executing the collective bargaining agreements it had agreed to ratify the actions of the Trustees of the Funds if such actions are within the scope of their authority under the Trust Agreement.

are necessary to facilitate proper administration of the Funds, to demand and collect employer contributions, and to enforce payment of such contributions by taking whatever steps are necessary, including the institution of legal actions, to collect contributions which may be owed to the Funds. The agreements also authorize the Trustees, by their representatives, to examine the employer's records if such examinations are deemed necessary in connection with the proper administration of the Funds.

We observe initially that the collective bargaining agreements provide for arbitration "should differences arise between the Company and the Union or an Employee of the Company." This provision, when read in connection with the Trust Agreement provision which authorizes the Trustees to institute legal actions in order to enforce payment of amounts which may be owed to the Funds, seems to indicate that the parties did not contemplate that the Trustees are required to resort to the grievance-arbitration procedures delineated in the collective bargaining agreements in all cases.[2]

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[2] Appellees argue that by executing the collective bargaining agreements, they authorized only the execution of Trust Agreements necessary to the *administraton* of the Funds. According to this argument, the filing of these claims by the Trustees cannot be properly characterized as a matter of Fund administration, and, consequently, the Trustees' actions are not within the scope of their powers as authorized in the collective bargaining agreements.

This argument is questionable. One cannot seriously contend that the determination of amounts owed to a trust fund is not a matter of trust administration. To the contrary, a trustee may be held to be in breach of his fiduciary duty to a trust if he is not diligent in determining the amounts so owed.

Given that the power to determine the amounts owed to a trust fund is a proper incident of trust administration, the ability to institute legal proceedings to enforce payments of amounts that may be owed would appear to be a necessary concomitant of that power.

This does not, however, necessarily mean that the Trustees' decision as to amounts owed and coverage are dispositive and we do not so decide.

We think this conclusion comports with national labor policy. As the Supreme Court has noted,

> [t]he duties of [a] . . . trustee of an employee benefit trust fund, under § 302(c)(5) of the Act, under principles long ago developed in the courts of chancery, and under the specific provisions of ERISA, are totally alien to . . . [the] activities [of collective bargaiing and the adjustment of grievances].

NLRB v. *Amax Coal Co.*, 101 S. Ct. 2789, 2798-99 (1981). *See Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960), wherein the Supreme Court held that the trustees of a fund established under a collective bargaining agreement are not typical third-party beneficiaries of such agreements, and thus are not necessarily subject to the same duties which would normally attach to such beneficiaries.

In addition, the Trustees should not be required to ask the Union to arbitrate this dispute. Such a requirement would, in our opinion, tend to undermine the independence of the Funds from Union control.

> Congress directed that union welfare funds be established as written formal trusts, and that the assets of the funds be "held in trust" . . . . Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity."

NLRB v. *Amax Coal Co.*, 101 S. Ct. at 2794 (citations omitted).

> Congress, in enacting Section 302 of the Labor Management Relations Act (29 U.S.C. § 186) intended that Welfare and Pension Funds established in accordance with that section would be independent of exclusive control by

> the union. Consequently, the failure of an employer to make contributions as required by an agreement is not an arbitrable dispute in the absence of a specific provision in the agreement requiring the Trustees to submit their claims to the arbitration procedure. . . .
>
> Since the Welfare Fund in the instant action was established in accordance with 29 U.S.C. § 186, it is the opinion of this Court that dismissal of the instant action in order to permit the union and the employers to arbitrate the right of the Trustees would be contrary to the intent of Congress in establishing independent Welfare Funds. If the parties to the collective bargaining agreement (the employers and the union) intended that claims for unpaid contributions to the Welfare Fund should be subject to the arbitration provision of the agreement, they should have so stated in unequivocal language.

Wishnick v. *One Stop Food & Liquor Store, Inc.*, 359 F. Supp. 239, 243 (N.D. Ill. 1973), *cited in Todd* v. *Casemakers, Inc.*, 425 F. Supp. 1375, 1378 (N.D. Ill. 1977). *But see Central States Southeast and Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980).[3]

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[3] In *Howard Martin*, the Seventh Circuit held that simple collection claims need not be submitted to arbitration. That court nevertheless found that arbitration was required because the underlying dispute was characterized as turning on which, if any, of the disputed workers were covered by the collective bargaining agreement. In such circumstances, the dispute was deemed appropriate for arbitration notwithstanding the necessity that the Trustees rely on the Union to trigger the arbitration process. Such reliance was not deemed by the Seventh Circuit to be a significant impediment to the Trustees' independence or to the Trustees' ability to have the dispute resolved. 625 F.2d at 173. *See also Trustees of National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Center*, ___ F.2d ___ (4th Cir. 1982).

We are aware that our allowing the district court to interpret the provisions of the collective bargaining agreements might, as appellees suggest, lead to a lack of uniformity in interpretation of the bargaining agreements. We are of the opinion, however, that such a danger would be minimal. The district court is, of course, not precluded from considering the reasoning of an arbitration panel that has previously interpreted provisions which are similar to the ones involved here. We feel that this danger, to the extent that it exists, is outweighed by the possibility that the Union might not be diligent in arguing the Trustees' position during arbitration. This possibility could arise, for example, as a result of a conflict between the duty that the Union has assumed by agreeing to arbitrate the Trustees' claims and its duty towards the employees whose other rights might be imperiled by vigorous enforcement of the Trustees' claims. *See Nedd* v. *United Mine Workers of America*, 556 F.2d 190, 210 (3d Cir. 1977). The possibility could also arise where, as is the case with Schneider, the Union no longer represents the covered employees.

In sum, "the national labor policy becomes an important consideration in determining whether the same inferences which might be drawn as to other third-party agreements should be drawn here." *Lewis* v. *Benedict Coal Corp.*, 361 U.S. at 470. As we have previously noted, moreover, Section 302 of the LMRA expreses the intent of Congress to establish and maintain the independence of Welfare Funds. Therefore, in accordance with the rationale of *Lewis* v. *Benedict Coal Corp.*, *supra*, and *NLRB* v. *Amax Coal Co.*, *supra*, we hold that the Trustees should not be obliged to arbitrate these disputes through the Union in the absence of express language to the contrary appearing in the collective bargaining or trust agreements. *See Owen* v. *One Stop Food & Liquor Store, Inc.*, 359 F. Supp. 243, 246-47 (N.D. Ill. 1973); *Boyle* v. *North Atlantic Coal Corp.*, 381 F. Supp. 1107, 1108 (W.D. Pa. 1971). *But see IBEW* v. *Dave's Electric Service, Inc.*, 382 F. Supp. 427, 430-33 (M.D. Fla. 1974).

We have examined the remaining issues presented by the Trustees, and find that they are either meritless or not properly before us. Accordingly, the orders of the district court are reversed, and these cases are remanded for further proceedings consistent with this opinion.

HENLEY, Circuit Judge, dissenting.

With all deference to considerations which have impelled the majority toward reversal, I reach a different result.

This case, not unlike *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 101 S.Ct. 1437, 1442 (1981), involves a tension between two aspects of national labor policy.[1] Because I find it clear that arbitration here would promote the national labor policies of maintaining industrial peace, avoiding delay, and deferring to the expertise of persons well acquainted with the standards of the industry and the law of the shop, and because I think deferral to arbitration would not significantly undermine the independence of the Trustees, I would affirm the judgment of the district court.

Although, to be sure, the LMRA and ERISA reflect a Congressional intent to maintain the independence of Welfare and Pension Funds such as those involved here, there also exists a strong public policy favoring labor arbitration, *see, e.g., United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*,

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[1] In *Barrentine*, the "tension" was between the policy encouraging negotiation and collective bargaining and the national policy, expressed in the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, which guarantees employees specific substantive rights. 101 S.Ct. at 1441. The underlying dispute here does not involve substantive statutory rights, but rather, the Trustees' right to receive employer contributions. This right to contributions arises solely from the provisions of the collective bargaining agreements, and not from those statutes dealing with the independence of trustees or the Fund. Thus, *Barrentine* may be distinguished.

363 U.S. 574 (1960); *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *Trustees of National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Health Center, Inc.*, No. 81-1318, slip op. at 4-5 (4th Cir. Jan. 28, 1982); *I.B.E.W.* v. *Dave's Electric Service, Inc.*, 382 F. Supp. 427, 430-33 (M.D. Fla. 1974), and arbitrability is ordinarily to be presumed when the parties' dispute arises out of the collective bargaining process. *See Barrentine* v. *Arkansas-Best Freight System, Inc.*, 101 S.Ct. at 1442, and the cases cited therein. *See also I.B.E.W.* v. *Dave's Electric Service, Inc.*, 382 F.Supp. at 430-31.

Where the underlying dispute involves mere collection matters not requiring an interpretation of the terms of collective bargaining agreements, then the policies justifying deferral to arbitration would not be served by such deferral, and arbitration should not be deemed a prerequisite to the Trustees' ability to litigate the dispute in the federal courts. However, where the underlying dispute involves an interpretation of the terms of the collective bargaining agreements authorizing payment of monies to the Funds, labor policy would best be served by requiring arbitration. *Trustees of National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Health Center, Inc., supra; Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (1980).

As has been observed, the underlying dispute here involves the interpretation of the term "covered employees," a term defined in the collective bargaining agreements only, and not in any of the ancillary agreements. Furthermore, the parties to the agreements have gone to the trouble of outlining detailed procedures to resolve disputes "as to the meaning or application of the provisions of the Agreement[s]." One need not be clairvoyant to foresee that the spirit of negotiation and compromise that forms the basis for such agreements might be seriously

compromised if the parties become aware that the terms of the agreements might be safely ignored or interpreted initially other than through the arbitration machinery.[2]

Furthermore, with respect to considerations of expedition and efficiency, litigation cannot be said to be superior to arbitration. The issue before us now does not go to the merits of the underlying dispute, and, while I do not deny the importance of this issue, I nevertheless observe that its resolution has already operated to delay resolution on the basic dispute by many months.

The majority is disturbed by the fact that arbitration would require the Trustees to rely on the Union to present their arguments. It is said that the independence of the Trustees would be impermissibly undermined if they are to be required to request such assistance.

I think, however, that the independence of the Trustees is already adequately protected by the mandates of the LMRA and ERISA. This case does not involve a situation such as that present in *Nedd* v. *United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977), which involved the failure of the Trustees of an admittedly Union dominated employee benefit fund to enforce contractual rights of the fund, where such enforcement was clearly contrary to the interests of the Union. Rather, this case involves employee benefit funds whose independcence has already been assured through Section 302(c)(5) of the LMRA. While these Funds should, of course, seek to guard their independence, their efforts should not necessarily be given effect

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[2] The underlying dispute involves the classification of temporary and part time workers in an industry which is apparently somewhat seasonal in nature, and which is arguably subject to varying degrees of employment demands at different times during a given season. Resolution of this dispute thus seems uniquely suited to the use of the expertise of an arbitrator having knowledge of the industry.

where the perceived threat to their independence is both hypothetical and unlikely. I find remote the possibility that deferral to the Union for arbitration purposes would actually tend to undermine the independence of the Funds. *Cf. Amalgamated Local No. 55, United Automobile, Aerospace & Agricultural Implement Workers of America* v. *Metal and Alloy Division of Silver Creek Precision Corp.*, 396 F. Supp. 667 (W.D. N.Y. 1975).[3]

Finally, it bears noting that jurisdiction was not forever barred by the district court; rather, it was deferred. In the unlikely event that arbitration is unsatisfactory, the Trustees again may seek appropriate relief by way of litigation.

As stated, I would affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[3] In that case, a Union, rather than the Trustees, used the arbitration mechanism provided by a collective bargaining agreement to seek enforcement of the employer's obligation to contribute to a benefit fund. The issue of the independence of the Trustees of the Fund was not raised, presumably because no threat to their independence was perceived.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 80-2116 and 80-2117

No. 80-2116

Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley, and R. V. Pulliam, Trustees of the Central States, Southeast and Southwest Areas Pension Fund,

Appellants,

v.

Prosser's Moving and Storage Company, a Missouri corporation,

Appellee.

No. 80-2117

Loran W. Robbins, Marion W. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley, and R. V. Pulliam, Trustees of the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds,

Appellants,

v.

Schneider Moving and Storage Company, a Missouri corporation,

Appellee.

Appeals from the United States District Court
for the Eastern District of Missouri

Submitted: October 13, 1982

Filed: February 16, 1983

Before LAY, Chief Judge, HEANEY, BRIGHT, and ROSS, Circuit Judges, HENLEY, Senior Circuit Judge, McMILLIAN, ARNOLD, and JOHN R. GIBSON, Circuit Judges, *en banc*.

ARNOLD, Circuit Judge.

These cases present important questions of labor law touching on the rights and obligations of trustees of Taft-Hartley Act pension and welfare funds in disputes with employers over their contributions to the funds. The trustees in these cases filed suits as third-party beneficiaries of the collective-bargaining agreements between the employers and the union. The District Court, relying largely on *Central States, Southeast & Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980), held in both cases that the trustees were obligated by the collective-bargaining agreements to submit their differences to arbitration. A divided panel of this Court reversed, holding that the trustees could sue in the District Court without resort to arbitration. *Robbins* v. *Prosser's Moving & Storage Co. & Schneider Moving & Storage Co.*, Nos. 80-2116, 80-2117 (8th Cir. March 24, 1982) (per curiam). Because that decision appeared to conflict with prior decisions of this Court, we granted rehearing en banc. We now reverse the District Court and overrule those prior decisions to the extent of any inconsistency with this opinion. Our conclusion is that the national pension policy embodied in the Labor

Management Relations Act (LMRA), the Employee Retirement Income Security Act (ERISA), and the Multiemployer Pension Plan Amendments Act (MPPAA), together with the terms of the collective-bargaining agreement and accompanying trust instruments, dictate that these trustees not be bound by the arbitration procedure, which they have no right to initiate.

I.

The facts of these two cases differ somewhat. The plaintiffs are trustees of the Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund, both of which were established pursuant to §302(c)(5) of the Labor Management Relations Act of 1947 (commonly referred to as the Taft-Hartley Act), 29 U.S.C. §186(c)(5). The complaints, which were filed against Prosser's Moving & Storage Company and Schneider Moving & Storage Company, are based on collective-bargaining agreements between the defendants and Local 610 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

The complaint in No. 80-2117 alleged that Schneider had been a party to successive collective-bargaining agreements with Local 610 from March 1, 1970, through February 28, 1979, which required Schneider to make certain contributions to the Pension Fund and the Health and Welfare Fund for each employee covered by the agreement.[1] According to the complaint, the agreement required contributions to be made by the fifteenth day of each month and obligated Schneider to furnish the trustees with a monthly contribution report containing the names of and hours worked by each employee and the contributions required on behalf of each. The plaintiffs further claimed authorization under the collective-bargaining agreements and the trust agreements to audit the employer's records to deter-

[1] Jurisdiction was alleged under §301 of LMRA, 29 U.S.C. §185(a), and §502 of ERISA, 29 U.S.C. §1132.

mine if all required contributions had been made. Schneider was alleged to have violated the agreement by refusing to allow the trustees to audit its payroll records, by failing to furnish the required monthly report, and by repeatedly failing to submit the monthly reports and payments on their respective due dates. Designated Record (D.R.) 3-5. The trustees prayed for an accounting and for all sums determined to be due, together with costs and attorneys' fees as provided in the agreements. D.R. 6-7. The complaint in No. 80-2116 against Prosser was almost identical.

The cases seem to differ in two respects: In February of 1979, a decertification election was held at the Schneider Company, and the Union was decertified as the representative of Schneider's employees. Second, as to the defendant Prosser the real controversy seems to revolve around the trustees' right to conduct an audit of the company's records. Schneider has already submitted to an audit. Schneider has sought to emphasize that its dispute with the plaintiffs is a question of coverage of some employees under the agreement, not the right of the plaintiffs to conduct the audit.

The defendants moved to dismiss both actions on the ground that the controversy should have been submited to arbitration under the terms of the collective-bargaining agreements. The District Court, relying on *Central States* v. *Howard Martin, supra,* agreed with the defendants and dismissed both complaints without prejudice pending the outcome of arbitration. The Court's opinion accepted *Howard Martin's* dichotomy of such suits into "simple collection matters," for which arbitration is not a prerequisite to suit, and more complex actions requiring interpretation of the collective-bargaining contract, in which arbitration is required. Both suits were found by the District Court to involve questions of coverage of certain employees under the agreement and therefore held to present questions of contract interpretation.

II.

Defendants' argument for compulsory arbitration is based on provisions in the collective bargaining contract, on the national labor policy favoring arbitration embodied in the *Steelworkers Trilogy*,[2] and on precedent. Close examination reveals that none of these supports will bear the weight of the defendants' position. Moveover, other important considerations, which we will discuss presently, militate against requiring arbitration.

A.

First, Prosser and Schneider contend that since the plaintiffs sue as third-party beneficiaries of the union contract, they should be bound by the grievance-arbitration procedures contained in the contract. The argument is based on traditional notions of third-party-beneficiary contract law: The third party seeking to enforce the agreement is bound by the terms of the contract and subject to the same defenses as the original promisee would be. Defendants are correct as a general proposition that "[t]he promisor may . . . usually assert against the beneficiary any defense which he could assert against the promisee if the promisee were suing on the contract." Calamari & Perillo, *Contracts* 623 (2d ed. 1977). This rule is, however, not without exception, and the Supreme Court has held collective-bargaining agreements to be such an exception. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960), was a suit by pension-fund trustees seeking to compel an employer to contribute to the fund. The issue before the Supreme Court was "whether the agreement is to be construed as making performance by the union [which had been made a third-party defendant] of its promises a condition precedent to Benedict's promise to pay royalty to the trustees." *Id.* at 465. The Court held

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[2] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

that collective-bargaining agreements are not typical third-party-beneficiary contracts and rejected Benedict's assertion, noting that "[i]f Benedict and other coal operators having damage claims against the union for its breaches may curtail royalty payments, the burden will fall in the first instance upon the employees and their families across the country." *Id.* at 469.[3]

While *Lewis* is arguably distinguishable from the instant case in that it dealt with a proffered substantive defense to the suit rather than the procedural defense of arbitration, the case is recognized as establishing an exception to the general rule that defenses good against the promisee are good against donee beneficiaries such as the Funds. Calamari & Perillo, *supra,* at 624 n.26. See also *Todd* v. *Casemakers,* 425 F. Supp. 1375 (N.D. Ill. 1977); *Wishnick* v. *One Stop Food & Liquor Store,* 359 F. Supp. 239 (N.D. Ill. 1973). And while *Lewis* alone may not be dispositive of Schneider's and Prosser's cases, it does refute their argument that the trustees, as third-party beneficiaries, are subject to the same defenses as could be asserted against a suit by the union.

B.

Second, defendants argue that the well-established national policy favoring arbitration as a means of resolving labor disputes compels the conclusion that arbitration is required in disputes such as these. The *Steelworkers Trilogy, supra,* is cited

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[3] The Court also expressed its concern, in words that are apt in the present context, with "protecting the interests of beneficiaries of the welfare fund, many of whom may be retired, or may be dependents, *and therefore without any direct voice in the conduct of union affairs.*" *Id.* at 470 (1960) (emphasis added). It would be unjust and contrary to the national labor policy, the Court reasoned, to reduce a recovery in favor of beneficiaries of a fund by reason of some default on the part of the union. "[T]he fund is in no way an asset or property of the union." *Id.* at 465.

as favoring arbitration of all industrial labor disputes. The defendants, however, overlook certain limitations inherent in the Court's decisions in those cases. First, as Justice Douglas pointed out, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. at 582. The arbitral process is, moreover, part of the collective-bargaining process. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. at 570 (Brennan, J., concurring). The arbitration clause and the "no strike" clause are generally each *quid pro quo* for the other. *Id.* at 567. And, as we shall explain, other important policies, such as the enforcement of federal statutory rights, may in a particular case have to be balanced against the policy favoring arbitration.

We recognize that defendants' position has support in past decisions of the Seventh Circuit and of panels of this Court. This very type of dispute has been held subject to arbitration by the Seventh Circuit in *Central States* v. *Howard Martin, supra.* The facts in *Howard Martin* are essentially the same as in Schneider's case. The opinion divides such suits into "simple collection matters," in which arbitration is unnecessary, and all those others in which some issue of contract interpretation is raised in defense. The precise meaning of the phrase "simple collection matters" is unclear, but it seems to mean something like cases of clear liability. See *Health Care Employees* v. *Constant Care Community Health Center*, 669 F.2d 213, 215 (4th Cir. 1982) (adopting the *Howard Martin* dichotomy but refusing arbitration where no substantive contractual defense was raised). The *Howard Martin* court, sensitive no doubt to the objection that the trustees have no right to invoke arbitration, replied that

> [t]o trigger the arbitration process, the Funds need only inform the Union, the members of which the Funds exist to serve, that Martin disputes the coverage of certain workers and ask the Union, the organization of primary interest, to file a grievance against Martin.

Central States, Southeast & Southwest Areas Pension Fund v. *Howard Martin, Inc., supra,* 625 F.2d at 173 (footnote omitted).

The defendants also aptly cite *Farmer* v. *Fisher,* 586 F.2d 1226 (8th Cir. 1978), in which three union-appointed trustees brought an action in a district court to secure the appointment of "an impartial umpire" under §302(c)(5)(B) of the LMRA, 29 U.S.C. §186(c)(5)(B), to break a deadlock between them and the three employer-appointed trustees. The deadlock was over whether the trust should sue the employer to collect certain allegedly delinquent contributions. The question of delinquency *vel non* depended on interpretation of the collective-bargaining agreement. The district court appointed the impartial umpire as requested, but this Court reversed. It held that questions of contract interpretation had to be resolved by the arbitration procedure set forth in the collective-bargaining agreement. The very trust agreement involved provided that "[n]o dispute or question arising under this Trust . . . shall be subject to the grievance or arbitration procedure provided for in any collective bargaining agreement." *Id.* at 1228. But the Court nevertheless held that arbitration was required, on the ground that the case did not involve trust "administration," as contemplated that the case did not involve trust "administration," as contemplated by the LMRA's deadlock provision, but rather an extraordinary, non-trust issue of contract interpretation. Foreshadowing the *Howard Martin* distinction, the Court said that "[t]he right of trustees as a body to sue for contributions under other circumstances, as, for example, where the right to contributions is undisputed, is not before us." *Id.* at 1229 n.4. The only effect of the decision, it was said, was to change the initial forum in which the trust's rights would be decided from a court to an arbitration proceeding. No substantive rights of trustees or beneficiaries would be affected.

Similarly Prosser emphasizes, and quite properly, this Court's decision in *Central States, Southeast & Southwest Areas Pension Fund* v. *CRST*, 641 F.2d 616 (8th Cir. 1981). There the Court affirmed the dismissal of a suit by trustees to compel inspection of employment and earnings records of all the employees of CRST. The trustees were entitled to see only the records of covered employees, the Court said, as that term is defined in the collective-bargaining agreement, and if a dispute arises as to who is covered, the grievance and arbitration procedure provided in that agreement should be used. The Funds have no right to invoke those procedures, but "it would appear that in the event a dispute should arise respecting coverage, the duty of fair representation would impel the Union to invoke the grievance machinery if the Funds were to request such action." *Id.* at 618.

Also part of this line of authority is *Layne-Western Co. Inc.* v. *Int'l Union of Operating Eng'rs*, 650 F.2d 155 (8th Cir. 1981), which holds, relying on *Howard Martin* and *Farmer* v. *Fisher, supra*, "that the issue of whether contributions are due to the funds for certain types of work performed under the collective bargaining agreements . . . presents a question of interpretation of the collective bargaining agreement and therefore an issue for the arbitrator." *Id.* at 158. *Layne-Western* is not so closely in point as *Howard Martin, Farmer* v. *Fisher*, and *CRST*. It was not an action by trustees against the employer to collect contributions claimed to be delinquent. It was a suit by the employer against the union to enjoin a strike called to protest the company's failure to make certain disputed payments. There was not even a potential divergence between the views and interests of the trustees and those of the union. It was clear that the union, which had gone to the length of striking over the issue, could be depended on to pursue arbitration vigorously, if that should turn out to be the indicated remedy. In addition, the Court stressed that once the arbitrator had determined what work was covered under the contract the trustees would have a right to "audit the appropriate payroll records of any Employer." *Id.* at 158 n.4.

There is no doubt that these cases support defendants' position. *Farmer* and *Layne-Western*, if not *CRST*, are closely in point and would normally govern our conclusion. On reflection, however, we believe that they were not correctly decided. *Stare decisis* is an important aspect of the judicial process, but sometimes it is more important to be correct than to be consistent. After carefully considering the implications of several recent cases, all of them decided after *Howard Martin*, and after analyzing the relationship between unions and §302(c)(5) funds, we are convinced that we should depart from the panel opinions described above.

C.

The national pension policy embodied in §302(c)(5), of the LMRA, 29 U.S.C. §186(c)(5), in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1001 et seq., and in the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. 96-364, 94 Stat. 1295, 29 U.S.C.A. §§1132a et seq. (1976-81 Supp.), confers statutory rights on beneficiaries of funds like those that brought this case. Although these rights of course originate in the private contract between union and employer, Congress has chosen to give them considerably more protection than the traditional state-law action for breach of contract would afford. Recent Supreme Court cases illuminate the nature of this protection and underscore the important differences between unions and trust funds.

In *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), the Court emphasized that ERISA codified the trustee's obligations at common law:

> ERISA essentially codified the strict fiduciary standards that a §302(c)(5) trustee must meet. See 29 U.S.C. §1002(1) & (2) . . . Section 404(a)(1) of ERISA requires a trustee to "discharge his duties . . . solely in the interest of the participants and beneficiaries . . .." [citations omitted]. Sec-

> tion 406(b)(2) declares that a trustee may not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. §1106(b)(2).

Id. at 332-33. The incorporaton of common-law principles into the statute was further described in Justice Stewart's opinion for the Court:

> Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. Restatement (Second) of Trusts §170(1) (1957); 2 A. Scott, Law of Trusts §170 (1967). To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalty must be enforced with "uncompromising rigidity." *Meinhard* v. *Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (Cardozo, C.J.).

Id. at 329.

The question presented in *Amax* was whether employer-appointed trustees of a §302(c)(5) fund were "representatives" of the employer "for the purposes of collective bargaining or the adjustment of grievances" within the meaning of §8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(B). The union had struck in an attempt to get the employer to continue contributing to national trust funds for the benefit of employees. The company wanted to establish its own trust fund for the employees at one of its mines, and to name the management trustees of that fund. The national funds, on the other hand, were contributed to by many employers. Amax, as a member of the Bituminous Coal Operators Association, had had a voice in selecting the management trustees of the national funds, but if its contributions were to go to a separate, one-mine fund, it alone would select all the

management trustees of that fund. Amax claimed that the union's efforts were an unfair labor pratice under §8(b)(1)(B), on the theory that trustees were collective-bargaining representatives of management, and that the union was trying to coerce Amax in the selection of these representatives. The Court rejected this argument. It noted that "nothing in the language of §302(c)(5) reveals any congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him . . .." 453 U.S. at 330. It stressed the separateness of the fund and its trustees from both the union and the employer. And it referred approvingly to the following remarks by one of the two sponsors of §302(c)(5):

> Senator Ball stated that "all we seek to do by [§302(c)(5)] is to make sure that the employees whose labor builds this fund and are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that, if necessary, they can go into court and obtain the benefits to which they are entitled." 93 Cong. Rec. 4753 (1947) . . ..

Id. at 331.

We also find language in *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), of some relevance. There, the Court referred to the MPPAA, which added a new Section 515 to ERISA, 29 U.S.C.A. §1145 (1976-81 Supp.), reading as follows:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Id. at 86 (footnote omitted). The Court referred to a passage from the legislative history of this new section:

> The provision which was eventually enacted as [§515] was added to S. 1076 by the Senate Committee on Labor and Human Resources. The Committee explained that the pro-

> vision was added because "simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to the contributions," and steps must be taken to "simplify delinquency collection." Senate Committee on Labor and Human Resources, S.1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess., 44 (Comm. Print, Apr. 1980) (1980 Senate Labor Committee Print) (emphasis added). During floor debate, Senator Williams and Representative Thompson explained the purpose and meaning of [§515] in the same language used in the Senate Labor Committee Print.

Id. at 87 (footnote omitted). The disapproving reference to what complicated defenses raised by employers have done to "simple collection actions" is striking in light of the *Howard Martin* court's use of the same phrase.[4]

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[4] The quoted Senate Committee print also states that "[r]ecourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly." Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 44 (Comm. Print 1980). In the House, moreover, Representative Thompson, Chairman of the Committee on Education and Labor and floor sponsor of the House companion bill, stated: "Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and *without regard to issues which might arise under labor-management relations law - other than 29 U.S.C. 186*," the provision making certain employer payments to labor organizations illegal. 126 Cong. Rec. 23039 (1980) (emphasis added).

Kaiser had to do with the employer's right to assert, in a court action brought by trustees, the defense of illegality. We quote the legislative history of MPPAA here simply to demonstrate Congress's recently expressed resolve to facilitate efforts by trustees to enforce employers' obligations. Issues of arbitrability can be quite complex, and allowing them to be injected into trustees' collection suits can frustrate this legislative purpose.

The Court recently underscored again the importance of the funds' independence from the union, and the distinctions between the union's interests and those of the beneficiaries. In *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 102 S. Ct. 1226 (1982), the following description appears of §302(c)(5):

> The section was meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders. Proponents of this section were concerned that pension funds administered entirely by union leadership might serve as "war chests" to support union programs or political factions, or might become vehicles through which "racketeers" accepted bribes or extorted money from employers.

Id. at 1232. The Court also remarked, *id.* at 1233, that "potential beneficiaries [of §302(c)(5) funds] are [sometimes] not members of the bargaining unit" that the union is obligated to represent. "[F]ormer members and their families may suffer from discrimination . . . because the union need not 'affirmatively . . . represent [them] or . . . take into account their interests in making bona fide economic decisions in behalf of those whom it does represent.' *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20." *Id.* at 1233-34 (footnote omitted).[5]

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[5] The following passage from *Allied Chemical, supra*, 404 U.S. at 181 n.20, quoted with approval in *Robinson, supra*, 102 S. Ct. at 1234 n.14, is also significant:

> Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col. L. Rev. 909, 916-920 (1970). The retiree, moreover, would have a federal remedy under §301 of the Labor

The Supreme Court has, moreover, recently reemphasized that certain statutory labor rights, for example rights under the Fair Labor Standards Act, are not subject to waiver under a grievance-arbitration clause. *Barrentine* v. *Arkansas Best Freight System*, 450 U.S. 728 (1981). Although *Barrentine* involved a different right from those under consideration here, it at least shows that the presumption in favor of arbitration is not, of itself, sufficient to place statutory rights or obligations, such as those imposed on trustees and employers by ERISA and MPPAA, under the arbitral process. *Cf. Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII cause of action not subject to arbitration).

The notion of nondelegability and non-waiver of the trustees' responsibilities has also received pointed support in the Third Circuit's recent decision in *Rosen* v. *Hotel & Restaurant Employees*, 637 F.2d 592 (3d Cir. 1981). *Rosen* is particularly important because of the difficult, if not untenable, position in which it would placed the trustees if *Howard Martin* were followed. In that case a retired employee sued his union and the pension fund to recover his pension under the collective bargaining agreement. The fund asserted that Rosen did not have the required years of credited service because his employer had failed to make contributions for some years of his employment. The Court of Appeals held Rosen entitled to a pension because the trustees had a fiduciary obligation to notify him, as a future beneficiary of the fund, that his pension was in jeopardy by reason of his employer's failure to contribute. The court

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Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith* v. *Evening News Assn.*, 371 U.S. 195, 200-201 (1962); *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 470 (1960).

This reasoning would be rendered nugatory by a rule of law that makes trustees' access to the courts subject to an effective veto by the union.

found this duty in the trustees' common-law obligations, as codified in ERISA.[6] Crucial to the present discussion was this statement by the Third Circuit:

> In addition, defendants' status as fiduciaries requires them to take action against employers who fail to contribute to the fund as required by the plan. This obligation could require the trustees to commence suit, or to picket the non-contributing employer; but some action must be taken to safeguard beneficiaries' credited service.

Id. at 600. It seems that the trustees of Taft-Hartley pension funds are in danger of being whipsawed by the decisions in *Rosen* and *Howard Martin*. In the Third Circuit they are under a probable duty to sue for delinquent contributions, and in the Seventh Circuit they are prevented from doing so in many cases.

D.

We do not claim that these recent Supreme Court opinions require us to depart from our prior panel opinions, or that *Rosen* is logically irreconcilable with them. The cases we have summarized all arose in different contexts, and none of them focused on the precise question presented here. But they are suggestive enough to raise serious questions about the rationale of *Farmer*, *CRST*, and *Layne-Western*. Basically, those cases say fund trustees can easily get the union to pursue arbitration, or sue it for not doing so. We cannot agree that unions can be expected to act so readily in the funds' interests.

The union's and the funds' interests will not always be in harmony. The union's primary interest, and properly so, is in keeping as many of its members as possible working, with the best possible wages and working conditions. Arbitration costs

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[6] In so holding, the Third Circuit relied on our decision in *Phillips v. Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976).

money, and the union may have better or more pressing uses for its limited funds.[7] It may not wish to bear its half of the cost of an arbitration proceeding. In addition, the pressing of a claim for, say, an audit of the employer's books may irritate the employer in a way incompatible with the union's own legitimate goals. A pension-fund claim can result in a liability of many thousands of dollars for the employer. The union may prefer for that money to be available to pay the wages of its members who are now working, rather than to support former employees, or the families of deceased former employees. Worries about the present are for most union members (and for most other people, too) more pressing than worries about the future. The union may be inclined to trade off a potential pension-fund claim against some other bone of contention in its relations with the employer. And such a decision may be completely legitimate. In order to succeed in a suit against a union for an alleged breach of the duty of fair representation, the trustees would have to show something more than a mere refusal to take an arguably meritorious pension or welfare claim to arbitration. "[A] union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration." *Vaca* v. *Sipes,* 386 U.S. 171, 192 (1967). As the Supreme Court has held, moreover, *Allied Chem. & Alkali Workers* v. *Pittsburgh Plate Glass Co., supra,* the union has no affirmative duty to represent those who are no longer members. It may not even (as in Schneider's case) represent the employer's current employees. Defendants suggest that the trustees, in ad-

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[7] In Prosser's case the union on one previous occasion refused to arbitrate a trust-fund claim arising under the 1976 collective-bargaining agreement, even though the employer requested arbitration. We do not know why. It its motion to dismiss in the District Court, Prosser's claimed, *inter alia,* that this union conduct should estop the trustees to inspect records for the period in question.

dition to asking the union to invoke arbitration, could also seek administrative or criminal remedies, but those avenues are even more remote and uncertain than the second-hand access to arbitration that is put forward as the funds' main recourse.

The union and a pension fund are both fiduciaries. But they represent groups and interests that only partly coincide. We conclude that the national pension policy described above, and the rights of plan beneficiaries, can be vindicated as Congress seems to have intended only if trustees are given a direct right of access to the courts.

III.

Certainly it is true that arbitration, pension funds, and health and welfare funds, are all matters of contract. They either exist or not as the parties have agreed in the collective-bargaining contract and related documents. If the agreements in the cases before us provided in express words that trustees' claims could not come to court before questions of contract interpretation had been settled by arbitration, this would be quite a different case. But they do not. In fact, Article III, §5 of both trust indentures give the trustees the right to "examine pertinent records of each employer . . . whenever such examination is deemed necessary or advisable by the Trustee in connection with the proper administration of the trust," and Article III, §4, reads as follows:

> [the] Trustees shall take such steps, including *institution and prosecution of*, and intervention in, any *legal proceedings* that the Trustees in their discretion deem in the best interest of the fund to effectuate the collection or preservation of contributions or other amounts which *may be* owed to the trust fund, without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purposes." (emphasis supplied).[4]

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[4] The arbitration clause in the collective-bargaining agreements applies "should difference arise between the Company *and the Union* or any employee of the Company as to the meaning or application of the provisions of the Agreement." (Emphasis ours.)

Whatever else may be said about these provisions, one thing is clear: they do not unambiguously subject the trustees' rights and obligations to the union's privilege of invoking the arbitration process under the collective-bargaining agreement. The union may choose to assist the funds by invoking this process. Our holding in no way obstructs that alternative avenue of redress. Nor need we decide in the cases before us how to accommodate the judicial and arbitral processes and their results if both are invoked with respect to the same pension or welfare claim.[9] We hold only that the trustees may come into court without first getting the union to invoke the machinery of arbitration. To the extent that *Farmer*, *Layne-Western*, and *CRST* are inconsistent with this holding, they are overruled.

We leave all other questions, including possible defenses of waiver, estoppel, laches, and limitations, to the District Court for exploration on remand. The judgments are reversed, and the causes remanded for further proceedings consistent with this opinion.

It is so ordered.

HENLEY, Senior Circuit Judge, with whom JOHN R. GIBSON, Circuit Judge, joins, dissenting.

Today the court makes bad law.[1] It unnecessarily overrules three prior decisions of this court, rejects the reasoning of the Seventh Circuit in *Martin* and erodes the pro-

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[9] There may be some danger that courts will interpret agreements in a way different from arbitrators. We note, however, that courts are permitted to consider the reasoning of arbitration panels that have previously interpreted provisions similar to the ones *sub judice*.

[1] No effort is maded to qualify the decision as falling either within or beyond any of the "bad law" categories mentioned by Justice Rehnquist in his dissent in *Larkin* v. *Grendel's Den, Inc.*, 51 U.S.L.W. 4025, 4028 (U.S. Dec. 13, 1982).

nouncements of the Supreme Court in the *Steelworkers Trilogy*. Its decision may be perceived as doing disservice to the national policies of maintaining industrial peace, avoiding delay and deferring to the expertise of persons acquainted with industry standards and the law of the shop.

In prior decisions, this court has concluded that trust fund disputes requiring interpretation of collective-bargaining agreements initially should be submitted to arbitration.[2] *Layne-Western Co.* v. *International Union of Operating Engineers*, 650 F.2d 155 (8th Cir. 1981); *Farmer* v. *Fisher*, 586 F.2d 1226 (8th Cir. 1978); *see Central States, Southeast & Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981); *see also Health Care Employees* v. *Constant Care Community Health Center, Inc.*, 669 F.2d 213 (4th Cir. 1982); *Central States, Southeast & Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980); *International Brotherhood of Electrical Workers* v. *Dave's Electric Service, Inc.*, 382 F. Supp. 427, 433 (M.D. Fla. 1974), *remanded on other grounds*, 545 F.2d 987 (5th Cir. 1977). The court rejects the reasoning of these cases, holding instead that benefit fund trustees may initiate suit in federal court without resort to arbitration, even where the dispute in question involves issues of contract interpretation. I cannot agree with this departure from precedent.

We are told that in the *Prosser* case the basic question may be the right of the trustees to an audit of company accounts to determine whether appropriate payments have been made, but

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[2] In contrast, cases involving matters of trust fund administration, such as collection actions, need not be submitted to arbitration. *E.g.*, *Layne-Western Co.* v. *Int'l Union of Operating Eng'rs*, 650 F.2d 155, 158 (8th Cir. 1981). Since such disputes do not require the interpretation of a collective-bargaining agreement, the policies justifying deferral to arbitration are largely inapplicable.

that Schneider has submitted to audit and that the basic question raised relates to coverage. However, the reach of the court's opinion is not narrowed to audit issues, and it seems clear that in essence the underlying dispute in the cases at bar concerns the coverage of certain employees, for purposes of contribution, under the collective-bargaining agreements.[3] This issue, to be properly answered, requires resort to and interpretation of those contracts, and, therefore, under the terms of the agreements must be submitted to arbitration.[4]

In the *Steelworkers Trilogy*[5], the Supreme Court articulated the strong federal policy favoring arbitrability of labor disputes. This policy, based upon the national goal of industrial peace, *see, e.g., Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 377-79 (1974), provides an efficient and expeditious means of dispute resolution in the labor context, utilizing impartial arbitrators possessing specialized knowledge with respect to the industry and issues involved. In my view, this presumption of arbitrability is applicable to the basic dispute from which these appeals stem.

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[3] Both suits were found by the district court to involve questions of coverage of certain employees.

[4] The collective-bargaining agreements at issue provide the definition of the term "covered employees"; indeed, this term is not defined in any of the ancillary documents. The agreements also provide a grievance-arbitration mechanism "should differences arise between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of the Agreement." This provision is sufficiently broad to encompass the underlying dispute — employee coverage — in the instant cases. *See Steelworkers Trilogy, infra* note 5 (in light of national policy favoring arbitration, general arbitration provisions are to be broadly construed).

[5] *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The court, in reaching a contrary result, relies in large part upon recent Supreme Court decisions in the area of national pension policy. Although these opinions do discuss differences between unions and trust funds in this context, the majority concedes, *ante*, at 16, that the decisions do not compel departure from the prior panel opinions of this court. Indeed, there is nothing in the cited decisions, or the references to legislative history there included, that persuades me to abandon the traditional policy favoring the arbitration of disputes concerning the interpretation of collective-bargaining agreements. Nor do I believe that continued adherence to this policy in present context conflicts to any significant degree with the independence or obligations of the benefit fund trustees. The independence of the trustees is adequately protected not only by case law but also by the mandates of the LMRA and ERISA; further, if after the trustees have requested arbitration the union does not pursue that remedy, or fails to act in the best interest of the fund beneficiaries, the trustees are free to seek redress in the courts.

It is to be remembered that the unions have a duty of fair representation which impels them to invoke the grievance machinery in appropriate circumstances, *Central States, Southeast & Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d at 618, and this court should not presume a violation of that duty.[6] Rather, it should reject hypothetical and unlikely threats to the independence of the trustees and require the parties first to resort to arbitration, where the law of the shop and the terms of the collective-bargaining agreements may best be interpreted. One need not be clairvoyant to foresee that the spirit of negotiation and compromise that forms the basis for

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[6] It is, of course, somewhat troubling that the union was apparently decertified as the employees' representative in No. 80-2117. However, the union still exists, as does its duty of fair representation, and as noted, the trustees would be free to seek judicial redress should resort to arbitration prove unsuccessful.

such agreements might be seriously compromised if the parties become aware that the terms of the agreements might be safely ignored or interpreted initially other than through than through the arbitration machinery.

Absent some reasoning more compelling than that which the court has been able to muster, I am unable to justify, much less to join in, its decision.[7] Accordingly, I dissent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[7] Since the instant appeals were submitted, the Sixth Circuit has filed its opinion in *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, No. 81-1757 (6th Cir. Jan. 20, 1983). To the extent that the considerations in *Central Transport* parallel those raised here, the views expressed in this dissent appear to be consistent with the reasoning employed by the Sixth Circuit.

APPENDIX D

PUBLIC MOVERS OF GREATER ST. LOUIS
AND ST. LOUIS COUNTY

March 1, 1976 - February 28, 1979

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AGREEMENT

This AGREEMENT, dated March 1, 1976, by and between the _____ or its successors, located in St. Louis, Missouri, hereinafter called the "Company," and Local Union No. 610, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or its successors hereinafter called the "Union." It is further agreed that "Company" means the aforesaid Company and any other Company engaged in public moving in the Metropolitan St. Louis Area, as that area is defined by the Interstate Commerce Commission, which is owned or controlled, directly or indirectly, by the same interests that own or control the Company.

During the term of this Agreement, it is agreed that neither party shall be obligated to bargain individually or collectively with respect to any matter or subject covered by this Agreement, or with respect to any matter the subject of negotiations preceding this Agreement, excepting in the matter of grievances or as required by law or in the event any part of this contract be determined invalid or illegal.

This contract shall constitute the whole agreement between the parties as to rates of pay, wages, hours of work, conditions of employment and such other matters as herein stated.

ARTICLE I. UNION RECOGNITION

Section 1.1 The Company agrees to recognize, and does hereby recognize, the Union, and its properly authorized and identified agents and representatives as the exclusive bargaining agency for all of the employees of the Company as herein defined.

Section 1.2 The term "Employee" in the collective bargaining unit covered by this contract shall include only drivers, warehousemen, packers, and helpers engaged in storage, packing, and moving and shall exclude all other employees engaged in any other classification of work.

Section 1.3 The Company agrees that it will make no other contracts or Agreements with the employees falling within the aforedescribed collective bargaining unit, with respect to wages, hours or working conditions, whether such other agreement or contract be consistent or inconsistent with the terms hereof, as long as this contract shall be in effect.

Section 1.4 The Company agrees that they will not sponsor or promote, financially or otherwise, any group or other labor organization expressly established for the purpose of undermining the Union, nor will the Company interfere with, restrain, coerce, or discriminate against any of the employees covered by this contract in connection with their membership in the Union.

Section 1.5 For the purpose of preserving work and job opportunities for the employees covered by this Agreement, the employer shall not circumvent this contract and shall use its employees, members of the bargaining unit.

(a) For all Local Moving (residential and commercial)

(b) For all packing and unpacking, crating and uncrating, and delivery and pickup of all packing materials and equipment.

(c) For all warehousemen's work

(d) To work as helpers for all long distance work, loading and unloading of all long distance trucks, when the company has knowledge of the work, and when such work is to be performed in the Greater St. Louis Area. Drivers of two separate vehicles shall not be permitted to assist each other when the employer has knowledge of the work as origin or destination agent. A registered two man operation shall be permitted to assist each other on a single job.

ARTICLE II. UNION SECURITY

Section 2.1 (A) The Company recognizes and acknowledges that the Local Union is the exclusive representative of all employees in the classification of work covered by this agreement for the purposes of collective bargaining.

(B) All present employees who are members of the Local Union on the date of execution of this subsection shall remain members of the Local Union in good standing as a condition of employment. All present employees who are not members of the Local Union and all employees who are hired hereafter shall become and remain members in good standing of the Local Union as a condition of employment on and after the 31st day following the beginning of their employment or on and after the 31st day following the date of execution of this agreement or the effective date upon which a local bargaining unit becomes party to this Master Agreement, whichever is the later.

The parties recognize the fact to be that the Union's knowledge and experience within the industry here involved, together with the sources of competent manpower available to it, can be of assistance to the company in recruiting needed regular employees considered for hire on a permanent basis. It is therefore agreed that the company shall notify the Union when ever regular employees are to be hired and shall afford the

Union an opportunity to recommend job applicants. Selection of any regular employee shall be made solely by the Company after completion of its customary personnel procedures. The parties also recognize the fact that the Union's employment office may be of like assistance in supplying extra men to meet the Company's need for daily additional temporary manpower. It is therefore further agreed that the Company shall notify the Union's employment office whenever such daily additional temporary men are needed, and afford the Union a reasonable opportunity to recommend extra men to qualify and fill such need for temporary help. Selection shall be made soley by the Company.

(D) No provision of this Article shall apply in any State to the extent that it may be prohibited by State Law. If under applicable State Law, additional requirements must be met before any such provision may become effective, such additional requirements shall first be met.

(E) In those instances where subsection (B) hereof may not be validly applied, the Company agrees to recommend to all employees that they become members of the Local Union and maintain such membership during the life of this Agreement, to refer new employees to the Local Union representative, and to recommend to delinquent members that they pay their dues they are receiving the benefits of this contract.

(F) Nothing contained in this section shall be construed so as to require the Company to violate any applicable law.

Section 2.2 The Company agrees to deduct from the pay of all employees covered by this agreement dues, initiation fees of the local union and agrees to remit to said local union all such deductions. Where laws require voluntary written authorization by the employee, the same is to be furnished in the form required. No deduction shall be made which is prohibited by applicable law.

Section 2.3 The Union shall indemnify and save the Company harmless against any and all claims, demands, suits or other forms of liability that shall arise out of or by reason of action taken or not taken by the Company in reliance upon written information furnished to the Company by the Union, or for the purpose of complying with the provisions of this Article.

ARTICLE III. LEAVE OF ABSENCE

Section 3.1 **Time Off for Union Activities:** The Company agrees to grant the necessary and reasonable time off, without discrimination or loss of seniority rights and without pay, to one of its employees designated by the Union to attend a labor convention or serve in any capacity on other official union business, provided seven (7) calendar days written notice is given to the Company by the Union, prior to the beginning date of requested leave. The Union agrees that in making its request for the time off for Union activities, due consideration shall be given to the number of men affected in order that there shall be no disruption of the Company's operations due to lack of available employees.

Section 3.2 **Leave of Absence:** Any employee desiring leave of absence from his employment shall secure written permission from both the Union and the Company upon his making written application therefor, stating the reason for the leave if requested. An initial leave of absence shall be for thirty (30) days and may be extended for like periods, not to exceed ninety (90) days. Permission for same must be secured from both the Union and the Company. During the period of absence, the employee shall not engage in gainful employment within the industry. Failure to comply with this provision or misrepresentation of the reason for the leave shall result in the complete loss of seniority rights for the employees involved. Inability to work because of proven sickness or injury shall not result in the loss of seniority rights.

ARTICLE IV. SENIORITY

Section 4.1. The principle of Company-wide seniority is hereby recognized. In the event of a layoff affecting regular employees who have been employed for a period of sixty (60) days or more, the following factors shall govern:

(A Length of continuous service.

(B) Ability to do the available work competently.

Section 4.2. **Probationary Employment.** An employee, new to the company, who otherwise qualifies, shall be considered on a trial basis for a period of no longer than sixty (60) calendar days during which he may be separated from his employment without prejudice to, or recourse upon the Company. After completion of such probationary employment, such new employee shall be considered as a regular employee and his seniority shall date from the first date of his employment, or from the first date of his rehire. However, a new regular employee shall be eligible for all fringe benefits, as provided in this agreement, after one hundred twenty (120) days following the first date of his employment unless he had been immediately previously employed and covered as a regular in the industry in which event his eligibility for fringe benefits shall begin the first date of his employment or re-employment. An employee shall qualify for vacation benefits as outlined in Article XV. However, new employees shall qualify for holidays after sixty (60) days of employment as outlined in Article XI, Section 8.

Section 4.3. An employee who is laid off in accordance with the standards of Section 4.1 above shall be recalled according to the same standards, provided that eligibility for such recall shall not extend more than twenty-four (24) calendar months subsequent to the date of layoff. An employee who is laid off shall be recalled by verified notice. The steward shall be made aware of the verified recall.

Section 4.4. A list or roster of regular employees arranged in the order of their dates of employment shall be displayed on the Employer's Bulletin Board at all times.

Section 4.5. It has been mutually recognized that the Seniority Principle set forth in Article IV of the contract shall not apply to:

(A) The choice of equipment.

(B) Preference as to type or classification of work.

(C) Preference of work assignments.

(D) Preference of starting times.

It is further recognized that it cannot be applied for intervals of less than a day's time after the day has started. That is, to illustrate: Employees who are sent out at 8:00 A.M. and who return at different times in the day, cannot use seniority to displace, for the remainder of the day, junior employees whose assignments happen to last longer.

However, side by side with this acknowledgement goes the duty of management to give to senior employees the greater opportunities of employment. In other words, the older men in point of service are to be given those assignments which, according to the best judgment of management are likely to be the longer assignments. In this connection, management can only be expected to make its best estimate as to the probable length of jobs, since all parties realize it is very difficult to forecast with accuracy the duration of the various jobs.

Section 4.6. Seniority shall be deemed broken and all privileges under this Agreement shall cease, when an employee

(1) Resigns.

(2) Is discharged for just cause.

(3) Fails to report for work and notify his company of his inability to work without reasonable explanation thereof being presented within twenty-four (24) hours after his scheduled starting time.

(4) Has been on lay-off for more than twenty-four (24) months.

(5) Illegal use of drugs.

ARTICLE V STEWARDS

The right of the employees to select a steward or alternate steward is hereby recognized. The steward or alternate steward, when authorized or identified in writing by the Union to the Company shall be the recognized representative of the Company's employees covered by this contract and shall have the right to discuss grievances with the Company and shall see to the application and enforcement of the provisions of this contract in the interests of the Company, the Company's employees and the Union. It is understood that the steward or alternate steward shall not be authorized to call a work stoppage or in any way to interfere with scheduled work.

ARTICLE VI GRIEVANCE PROCEDURE

Should differences arise between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of this agreement, such differences shall be settled in the following manner:

Section 6.1. The aggrieved employee or employees shall first take the matter up with the shop steward who in turn will take the grievance up with the forman in charge of the department within three (3) working days after knowledge of the alleged violation. The employees shall have the right to have the shop steward present on any grievance.

Section 6.2. If no satisfactory adjustment is agreed upon within one (1) working day, the matter shall be referred in writing within five (5) working days by the steward and/or union to the general manager of the company involved, or some other executive officer of the Company with authority to act, who shall review the alleged grievance and offer a decision within five (5) working days after receipt of the same.

Section 6.3. If no agreement has been reached pursuant to the procedure specified in Section 6.1 and 6.2, the Union reserves the right to request arbitration of the dispute. If arbitration is requested by the Union within thirty (30) days following the decision of the General Manager, the Company and the Union agree to submit the grievance to an arbitration board as provided for in this Agreement. However, if arbitration is not requested by the Union, the Union reserves the right to use its economic power in support of its demands. Economic power must be taken within fifteen (15) days following the decision of the General Manager. It is agreed by both parties that any action taken by the Union shall not constitute a violation of this contract, notwithstanding any provisions of this contract to the contrary.

Section 6.4. If the grievance is submitted to arbitration, the Company and the Union agree to accept, as final and binding on all parties, the decision of the majority of an arbitration board consisting on one (1) member selected by the Company and one (1) member selected by the Union and the third selected by the two arbitrators nominated above. It shall be incumbent upon both parties to nominate the third arbitrator within seven (7) days after such notice is given. Upon the failure of the two arbitrators nominated as above to agree upon the third arbitrator, both parties agree to ask the U.S. Mediation and Conciliation Service to nominate five (5) persons for such third arbitrator from whom the parties will select one by each side alternately striking from the list, one name, commencing with the party seeking arbitration and the last name remaining on such

list will be deemed chosen as the third arbitrator. The expense of the arbitrator selected by the Company shall be borne by the Company. The expense of the arbitrator selected by the Union shall be borne by the Union. The expense of the third arbitrator selected or appointed shall be borne equally by the Company and the Union.

ARTICLE VII. MANAGEMENT

Section 7.1. It shall be the right of the Company to manage and direct its business and subject only to the terms and provisions of this agreement, the Company shall have the right to hire, discipline, discharge, promote, transfer, lay-off, and assign work to its employees, and in general exercise the usual rights of management excepting only as they are limited and restricted by this agreement.

ARTICLE VIII. NO STRIKE AND NO LOCKOUT

Except as provided for in Article VI, during the period of time that this Agreement is in force and effect, there shall be neither strike by the Union nor lockout by the Company.

ARTICLE IX. STRUCK GOODS AND PICKET LINE

Section 9.1. Recognizing that many individual employees covered by this contract may have personal convictions against aiding the adversary of other workers, and recognizing the propriety of individual determination by an individual workman as to whether he shall perform work, labor or service which he deems contrary to his best interests, the parties recognize and agree that:

It shall not be a violation of this agreement and it shall not be a cause for discharge or disciplinary action if any employee solely on his own initiative refuses to perform any service which, but for the existence of a controversy between a labor union and any other person (whether party to this agreement or not), would be performed by the employees of such person.

Likewise, it shall not be a violation of this agreement and it shall not be a cause for discharge or disciplinary action if any employee solely on his own initiative refuses to handle any goods or equipment transported, inter-changed, handled or used by any carrier or other person, whether a party to this agreement or not, at any of whose terminals or places of business there is a controversy between such carrier, or person, or its employees on the one hand and a labor union on the other hand; and such rights may be exercised where such goods or equipment are being transported, handled or used by the originating or interchanging or succeeding carriers or person, whether parties to this agreement or not.

The Company agrees that it will not cease or refrain from handling, using, transporting, or otherwise dealing in any of the products of any other company or cease doing business with any other person, or fail in any obligation imposed by the Motor Carriers Act or other applicable law, as a result of individual employees exercising their rights under this agreement or under law, but the Company shall, notwithstanding any other provision in this Agreement, when necessary, handle, use, transport or otherwise deal in such products and continue doing such business by use of other employees, (including management representatives, other carriers, or by any other method it deems appropriate or proper).

Section 9.2. It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action, in the event any employee refuses to go through or work behind any picket line, including the picket of the Union party to this Agreement and including picket lines at the Company's place or places of business.

ARTICLE X. DISCHARGE OR SUSPENSION

Section 10.1. It is understood and agreed that all employees shall do their best to further the interest of the Company by being sober, courteous, and respectful.

Section 10.2. The Company shall not discharge or suspend any employee without just cause and shall have given at least one warning notice of a complaint of a related nature against such employee in writing to the employee and steward and shall send a copy of the same to the Union; however, such warning shall not remain in effect for a period of more than nine (9) months from the date of said warning notice except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty, drunkenness, the use of intoxicating liquors while on duty, willful abuse of property, gross insubordination, refusal to accept assignment, illegal use of drugs (G.B.W).

Section 10.3. It is understood, however, that any employee discharged or disciplined under this article shall have the right to appeal such discharge or discipline under the Grievance Procedure as established herein, providing such appeal is made to the Company within five (5) working days of the date of discharge or discipline.

ARTICLE XI. OVERTIME AND PAY PRACTICES

Section 11.1 **Computing Time Worked:** The Company shall furnish time clocks or some other method of indicating time in and time out as is feasible or appropriate under the circumstances. In figuring the time worked by an employee, the Company shall credit him with time worked in the service of, and at the direction of, the Company. In figuring the time worked by an employee, the Company shall credit him with time worked from the moment that he leaves thew garage until he returns to the garage, except when he is expected or instructed to report for work at a particular hour, in which event he shall be credited with time worked from the moment he so reports; provided, however, that such employee in this unit covered by this agreement shall be compensated at a rate of pay stated herein and applicable to the work actually being performed at the time by such employee. This rate shall be paid to him for all

hours in which he is so working. In the event of commercial moving, the Company shall credit him with time worked from the time he is instructed to report to the work place, or begin to work, to the time he completes such work. It is mutually agreed between the parties to this contract that men assigned to a move shall be provided company transportation, by the company, to their personal transportation if left at point of origin of move, or at company premises, or, if asked to report to a specific location they shall be reimbursed for out-of-pocket expense on parking.

Section 11.2. **Call-In Time:** Whenever employees are requested or expected to report for work at a particular time and there is not work available for them, they shall be guaranteed a minimum of five (5) hours' pay at straight time rates whether they work or not, provided, that the employees will not be so compensated if he is not ready to, willing to, and available for work on the Company's premises or at the work place during the time for which he is being compensated. All extra employees shall be paid from the time requested to report for work, or from the time employee actually reports. When performing work at a premium rate of pay, in the event less than five (5) hours are worked, an employee shall be paid for the portion of said five (5) hour period actually worked at the premium rate of pay and for the remaining portion of said five (5) hours at his straight-time rate. When performing commercial work at the premium rate of pay, an employee shall be guaranteed five (5) hours at the premium rate in effect whether he works or not.

Section 11.3. **Pay periods:** All regular employees shall be paid weekly on Friday. All extra employees shall be paid upon completion of their tour of duty. All employees shall, with each pay check, receive an itemized statement of earnings and deductions.

Section 11.4. **Work Hours:** The regular work day shall begin at 8:00 A. M. and end at 4:30 P. M. Employees shall be allowed one-half hour for lunch. However, by mutual agreement be-

tween a Company and its employees the lunch period may be one hour, in which case the regular work day shall begin at 8:00 A. M. and end at 5:00 P. M.

However, the foregoing work hours may, from time to time, but not during a work week, be changed by any Company, providing: (a) the Company notifies the employee of the change on the preceding workday; (b) the starting time is not earlier than 7:00 A. M., not later than 8:30 A. M., and the end of an eight hour shift is not later than 5:00 P. M. and (c) the employee is paid at one and one-half (1-1/2) times his regular rate for hours in excess of eight (8) on such day. The foregoing starting time, shall not preclude the direction of any employee to start work at any time during the day when he is directed to report for work to start a job at a customer's location away from his employer's place of business.

Section 11.5 **Definitions:** Where the term "Local" is used herein, it shall refer to work done in the City of St. Louis, Missouri, or within a radius of 50 miles of the corporate limits of the City of St. Louis, Missouri. All other work shall, for the purposes of this agreement, be considered as "Long Distance Moving."

"Commercial" work shall mean all work performed for a business establishment, and involving the moving of office equipment, fixtures, records, and general office furniture, within the area termed as "Local."

Section 11.6 **Local Moving Rates of Pay:**

(A) Straight-time the local rate shall be paid for the first eight (8) hours worked -

(1) On local residential or commercial work performed between 8:00 A. M. and 4:30 P. M.

(2) On loading and unloading long distance trucks between 8:00 A. M. and 4:30 P. M. when the employee does not accompany the truck.

(B) Time and one-half the local rate shall be paid:

(1) For all work performed in excess of eight (8) hours in a regular workday.

(2) For all ocal residential or commercial work performed before 8:00 A. M. or after 4:30 P. M.

(3) For all work performed locally before 8:00 A.M. or after 4:30 P.M. or on Saturdays, in connection with the packing, or unpacking, loading or unloading of long distance vehicles engaged in long distance moving when the employee does not accompany the truck.

(4) For commercial or residential work performed on Saturdays.

(C) Double the local rate shall be paid:

For all work performed on Sundays or Holidays, loading or unloading, packing or unpacking at customer's location or company warehouse of long-distance shipments, except as provided for in subsections (B) (3) above.

(Note: Wherever the starting and ending times, 8:00 A.M. and 4:30 P.M. appears above in this Section, if the work hours have been changed for any employee pursuant to Section 11.4 above, the revised starting and ending times shall be considered substituted for such employee on that day.)

(D) In the event that a commercial moving job is started on a week day before 8:00 A.M. or after 4:30 P.M., or on a Saturday, Sunday, or a holiday, the Company will notify the Union and will indicate the time, the number of employees involved and the place.

Section 11.7 **Long Distance Moving**

(A) Straight-time the long distance rate plus a daily travel allowance of eighteen dollars and fifty cents ($18.50) shall be paid to all employees who have been away from their home terminal for a period of twelve (12) hours or more in any twenty-four (24) hour period. A daily travel allowance of Six ($6.00) Dollars shall be paid to all employees who leave and return to their home terminal and have not been away twelve (12) hours in any twenty-four (24) hour period.

(1) While engaged in long distance driving;

(2) While riding as a helper on a long distance moving;

(3) While engaged in loading or unloading, packing or unpacking, at point or origin, or at point of destination, provided the employee accompanies the truck.

(B) Men working on trucks equipped with sleeper cabs shall not be paid for time while sleeping in such cabs.

(C) Long distance straight time shall be paid at the rate of ten (10) hours for a twenty-four (24) hour period while trucks are laid up for repairs, or waiting for return loads, while away from the City of St. Louis, Missouri.

Section 11.8. **Holidays:** A regular employee shall receive eight (8) hours pay at the hourly rate for his classification for the following holidays not worked:

New Years Day	Labor Day
Memorial Day	Veterans Day
Independence Day	Thanksgiving Day
Christmas Eve	Christmas Day

Two additional holidays shall be granted to employees in addition to the above listed holidays. Said holiday shall be taken any time during the year, mutually agreed to by employer and employee, provided a two week notice is given by employee. The Employer will not refuse to give the day requested unless proof is shown that men needed to work makes refusal to mutually agree necessary, providing:

(A) Such employee has been employed sixty (60) days or more prior to said Holiday by the Company except as provided for in Article IV - Section 2.

(B) Such employee shall have worked for the Company on his last scheduled workday before and his first scheduled workday after said Holiday. No employee shall forfeit his holiday pay if he has been available for scheduled work but was unable to do so because of accident or illness as proven by competent medical testimony; funeral leave; or because or such absence which has been approved by the Company for an urgent, necessary and compelling personal reason, prior to the scheduled starting time of the day involved.

(C) Such employee, if he is on layoff status at the time the given Holiday occurs, he has worked for his employer within two weeks before or within two weeks after said Holiday.

Section 11.9. **No Ovetime on Overtime:** No employee shall be paid overtime twice for the same hours, nor shall overtime be computed upon any rate which in itself includes an overtime premium.

ARTICLE XII. RATES OF PAY

Section 12.1. The straight time hourly rates of pay for employees shall be as follows:

LOCAL WORK	Effective 3/1/76	Effective 3/1/77	Effective 9/1/77	Effective 3/1/78	Effective 9/1/78
Driver	$5.75	$5.95	$6.10	$6.30	$6.45
Warehousemen	$5.75	$5.95	$6.10	$6.30	$6.45
Packer	$5.75	$5.95	$6.10	$6.30	$6.45
Helper	$5.65	$5.80	$5.90	$6.05	$6.15

LONG DISTANCE WORK	Effective 3/1/76	Effective 3/1/77	Effective 9/1/77	Effective 3/1/78	Effective 9/1/78
Driver	$5.75	$5.95	$6.10	$6.30	$6.45
Helper	$5.65	$5.80	$5.90	$6.05	$6.15

Travel allowance shall be paid in accordance with Article II, Section 7.

Section 12.2. A new employee without previous experience in the Moving Industry in St. Louis may be hired at the rate of 80¢ per hour less than the scale for the classification of work for which hired, provided that his hourly rate is adjusted automatically 10¢ an hour upon the completion of every 30 calendar days of employment until the classification rate of Section 12.1 is attained. An employee with work experience when referred by the Union, shall be paid at the rate stated for his classification.

Casual, temporary, or part-time employees, exclusive of employees who regularly report to the union employment office, may be hired at the rate of $1.50 per hour less than the helpers rate specified in Article 12, Section 2 presently in effect. A casual or temporary employee is one who, hired for the day, and without promise of continued employment, is terminated upon the completion of the day. A part-time employee is one who normally has a regular job elsewhere. A seasonal employee may be hired at the rate of $1.50 per hour less than the helpers rate specified in Article 12, Section 2, presently in effect. A seasonal period customarily between May 15th and September 15th. With respect to seasonal employees the company agrees that, within 31 days following employment a seasonal employee shall not be permitted to work unless, or until, he submits to the company official proof supplied by the Union that he has become a member or has applied for membership in the Union. Whenever any of the above mentioned employees are required to drive such employees shall receive the rate of pay specified for that classification, specified in Article 12, Section 2.

Section 12.3. The rights provided to the Company by Section 12.2 shall be withdrawn to any Company which has been found by the Union to have abused such rights.

Section 12.4. Whenever an employee classified as a helper works as a driver, packer, or warehouseman, he shall be compensated at the driver's, packer's or warehouseman's rate for all hours he is so working. An employee who works six (6) calendar months or more in a calendar year in a higher classification shall be paid the rate for such classification for all hours he works thereafter.

ARTICLE XIII HEALTH AND WELFARE BENEFITS

Section 13.1. Effective March 1, 1976, the Employer shall contribute to the Central States, Southeast and Southwest Areas Health and Welfare Fund, which is to be administered jointly by the parties thereto, the sum of Sixteen Dollars and fifty cednts ($16.50) a week; effective March 1, 1977, Nineteen Dollars ($19.00) a week; effective March 1, 1978, Twenty-one Dollars and fifty cents ($21.50) a week for each employee covered by this Agreement who has been on the payroll sixty (60) days or more, after completing his probationary period as provided for in Section 4.2.

Section 13.2. The Employer presently making payments to the Central States, Southeast and Southwest Areas Health and Welfare Fund, and the Employers who may subsequently begin to make payments to such fund shall continue to make such payments for the life of this Agreement.

Section 13.3. By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties to the Health and Welfare Fund referred to in Section 13.1 to enter into appropriate trust agreements necessary for the administration of such fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such trustees within the scope of their authority.

Section 13.4. If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence,

the Employer shall continue to make the required contributions for a period of four (4) weeks. If an Employee is injured on the job, the Employer shall continue to pay the required contributions until such Employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months. If an Employee is granted a leave-of-absence, the Employer shall collect from said Employee, prior to the leave-of-absence being effective, sufficient monies to pay the required contributions into the Health and Welfare Fund during the period of absence.

Secton 13.5. Contributions to the Health and Welfare Fund must be made for each week on each regular Employee, even though such employee may work only part-time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other Health and Welfare Fund.

Section 13.6. Employees who work either temporarily or in cases of emergency under the terms of this contract shall not be covered by the provisions of this Article.

The Company further agrees to provide weekly disability each week in an amount not to exceed $125.00 a week when combined with Workmen's Compensation for those weeks up to in which the employee has been found by the Workmen's Compensation Commission to be eligible for compensation under the law.

ARTICLE XIV PENSIONS

Effective March 1, 1976, the Employer shall contribute to a Pension Fund the sum of Seventeen Dollars ($17.00) per week for each regular employee covered by this Agreement who has been on the payroll sixty (60) days or more after becoming a regular employee.

Effective March 1, 1977 the Employer shall contribute to a Pension Fund the sum of Nineteen Dollars and fifty cents ($19.50) per week for each regular employee covered by this

Agreement who has been on the payroll sixty (60) days or more, after completing his probationary period as provided for in Section 4.2.

Effective March 1, 1978 the Employer shall contribute to a Pension Fund the sum of Twenty-two dollars ($22.00) per week for each regular employee covered by this Agreement who has been on the payroll sixty (60) days or more, after completing his probationary period as provided for in Section 4.2.

This Fund shall be the Central States, Southeast and Southwest Areas Pension Fund. There shall be no other pension fund under this contract for operations under this contract or for operations under the Southwest and Southeast Areas contracts to which Employers who are party to this Contract are also parties.

By execution of this Agreement, the Employer authorizes the Employers' Associations which are parties hereto to enter into appropriate trust agreements necessary for the administration of such fund, and to designate the Employer Trustees under such Agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority.

If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months. If an employee is granted a leave-of-absence, the Employer shall collect from said employee prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Pension Fund during the period of absence.

Contributions to the Pension Fund must be made for each week on each regular employee even though such employee may work only part-time under the provisions of this contract, in-

cluding weeks where work is performed for the Employer but not under the provisions of this Contract, and although contributions may be made to the Pension Fund.

Employees who work part-time, temporarily, or in cases of emergency, under the terms of this contract, shall not be covered by provisions of this Article; and provided further, Employer shall not be obligated to pay on any employee who does not perform 25 hours of work in any week. However, the employer agrees to make contributions for each regular employee on the basis of a minimum of 35 weeks in any year.

ARTICLE XV VACATIONS

Section 15.1. Any employee employed for one (1) year by the same Company shall be entitled to a one-week vacation with pay. Any employee employed for three (3) consecutive years by the same Company shall be entitled to a two (2) week vacation with pay. Employees employed for seven (7) consecutive years by the same Company shall be entitled to three (3) weeks vacation with pay. An employee employed for thirteen (13) consecutive years by the same company shall be entitled to four (4) weeks vacation with pay.

However, no employee shall receive a paid vacation unless he has worked a total of 1200 hours for one Company in the year immediately preceding the date of his eligibility for such vacation. Time lost due to sickness or accident shall be considered as time worked toward 1200 hour qualification.

Employers who leave the service of the Company, after completing one (1) full year of service shall receive a pro-rata vacation on the basis of one-twelfth (1/12) of his earned vacation for each month of completed service after his anniversary date.

For the purpose of this Article a week's pay shall be an amount equal to forty-five (45) times the hourly rate for his permanent classification of work.

Section 15.2. Vacations shall be given according to seniority, and cover the entire year giving due regard to employees anniversary date and his expressed desire and to the needs of the Company's business.

Section 15.3. While on a paid vacation, an employee shall not perform work for the Company or for any other Company covered by this Agreement.

Section 15.4. Vacation pay shall be paid on the last pay day prior to the beginning of the vacation period.

Section 15.5. Vacation schedules for employees shall be posted in a conspicuous place at least sixty (60) days prior to the scheduled dates.

Section 15.6. If a holiday falls during an employee's vacation he shall be given an additional day of vacation with pay.

Section 15.7. An employee who withholds selection of his vacation schedule beyond the date set by the Company shall be given the last choice to select his vacation.

Section 15.8. An employee who chooses to split his vacation shall, upon selection of his first choice of time off, wait until all other employees in the Company who are eligible have exercised their choices of vacation dates.

ARTICLE XVI MAINTENANCE OF STANDARDS

Section 16.1 The Company agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the minimum standards in effect in the Company's place of busines at the time of the signing of this Agreement and that wherever any of the terms of this agreement said improvements shall be made by the Company.

Section 16.2. In case of individual Company hardship with respect to the application of this Article for the duration of this Agreement, this Article may be waived or modified in its ap-

plication to all or any employees of such Company, provided the Company, its employees, and the Union agree to such waiver or modification.

Section 16.3. The Company agrees not to enter into any agreement or contract with his employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such agreement shall be null and void.

ARTICLE XVII MILITARY LEAVE

Employees enlisting or entering the military or naval service of the United States, pursuant to the provisions of the Selective Service Act of 1948, shall be granted all rights and privileges provided by the Act.

ARTICLE XVIII PRESCRIPTICARE

Section 18.1. The Employer shall contribute to the Teamsters Local 610 Prescripticare Trust Fund (or to a designated insurance agency), which is to be administered jointly by the parties thereto, the monthly sum specified in the following schedule for each employee covered by this Agreement who has been on the payroll thirty (30) days or more.

EFFECTIVE	MARCH 1, 1976	$6.00 Per Month
EFFECTIVE	MARCH 1, 1978	$6.50 Per Month

Section 18.2. Employers presently making payments to Teamsters Local 610 Prescripticare Trust Fund (or to a designated insurance agency), and Employers who may subsequently begin to make payments, shall continue to make such payments for the life of this Agreement.

Section 18.3. By the execution of this Agreement, the Employer authorizes the Employers' Association which are parties hereto to enter into appropriate trust agreements necessary for the administration of such fund, and to designate the

Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such trustees within the scope of their authority.

Section 18.4. If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of two (2) months. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months. If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions during the period of absence.

Section 18.5. Contributions to the Trust Fund (or to a designated insurance agency) must be made for each month on each regular employee, even though such employee may work only part-time under the provisions of this Contract, and although contributions may be made for those months where work is performed for the Employer but not under the provisions of this Contract, and although contributions may be made for those months into some other Fund.

Employees who work either temporarily or in cases of emergency under the terms of this contract shall not be covered by the provisions of this paragraph.

Section 18.6. The intent of this Article is to provide those benefits outlined in the Trust Agreement creating the Teamsters Local 610 Prescripticare Trust Fund and the parties hereby agree that any language change in this Article necessary to be in compliance to provide those benefits shall be agreed to and incorporated as though fully set out herein, as long as the basic intent of this Article is not changed by any additional, or modified language, and further that the schedule of payments may not be altered during the term of this agreement, by such automatic language change.

ARTICLE XIX UNION RESPONSIBILITY

Section 19.1. The Union recognizes the responsibility imposed upon it as the exclusive bargaining agent of the employees and realizes that, in order to provide maximum opportunities for employment, good working conditions, and fair wages, and Company must render service to the public at the lowest possible cost consistent with the terms of this Agreement.

Section 19.2. The Union agrees to cooperate with the Company and support its efforts to insure a full day's work on the part of the employees covered hereby and that it will support the Company in its efforts to strengthen good will between the Company, the customer, and the employee.

ARTICLE XX GENERAL PROVISIONS

Section 20.1. **Employee Liability for Loss or Damage:** Employees may be charged for loss or damage to equipment or to household goods if the damages result from violation of the Company instructions, from lack of precautions, which a person of the same or similar experience would be expected to observe, or in spite of previous warnings or reprimands in regard to the same or similar circumstances.

Section 20.2. **Bonds:** Should the Company require any employee to give bond, cash bond shall not be compulsory, and any premium involved shall be paid for by the Company. The primary obligation to procure the bond shall be on the Company. If the Company cannot arrange for a bond, it must so notify the employee in writing. The employee then shall be allowed thirty (30) days from the date of such notice to make his own bonding arrangements, but the Company shall not be obligated to keep him working during such period; standard premiums only on said bond shall be paid by the Company and any excess premium shall be paid by the employee. A standard premium shall be that premium paid by the Company for bonds applicable to all other of its employees in similar classifications.

Section 20.3. **Examinations:** Physical, mental, or other examination required by a city, state or federal government body, or by the Company shall be promptly complied with by all employees; provided, however, the Company shall pay for all such examinations. Examinations are to be taken at the Employee's home terminal and are not to exceed one in any one (1) year, unless otherwise required by law, rule or regulation of any city, state or federal governmental regulatory body.

The Company reserves the right to select its own medical examiner or physician, and the Union may, if in its opinion it thinks an injustice has been done to an employee, have said employee re-examined at the Union's expense.

Section 20.4 **Personal Identification:** Should the Company find it necessary to require employees to carry a record of full personal identification, such requirement shall be complied with by the employees. The cost of such personal identification shall be paid for by the Company.

Section 20.5 **Unsafe Equipment:** No employee shall be compelled to take out equipment that is not mechanically sound and properly equipped to conform with all applicable city, state and federal regulations.

Section 20.6 **No Unauthorized Riders:** No driver shall allow anyone other than employees of the Company who are on duty to ride on his truck, except with the written authorization of the Company.

Section 20.7 **Uniforms:** If the Company requires its employees to wear uniforms, the Company shall pay the cost of the same, and the uniforms must bear a Union label. It shall be the duty of the employees to keep the uniforms clean.

Section 20.8 **Transfer from Company to Company:** No employee covered by this contract shall be temporarily transferred from the payroll of one Company to that of another without prior approval and consent of both the Union and the Com-

pany. The section shall not be so contrued, however, as prohibiting any employee from performing services for a company other than his Employer so long as such employee remains on the payroll of his employer for such time also worked for another Company, provided all regular employees of the Company receiving the transferred employees are working.

SEction 20.9 **Failure to Report for Work:** Employees are expected to report for work at their scheduled starting time.

Section 20.10 **Post Contract:** A copy of this agreement shall be posted in a conspicuous place.

Section 20.11 **Agent's Access to Company Office:** Representatives of the Union shall have admission, upon application to the Company, to the office of the Company at any time during working hours for the purpose of ascertaining whether or not this agreement is being observed by the parties hereto, or for the purpose of assisting in the adjustment of grievances, provided that such activity does not interfere with, obstruct, or take the time of employees as they work.

Section 20.12 **No Discrimination:** There shall be no discrimination of any kind against any member of the Union by the Company or any representative in its employ.

Section 20.13 **Bulletin Board:** The Union shall have the privilege of posting on the bulletin board provided by the Company all notices of union meetings and any other matter pertaining to official union business as approved by the Company.

Section 20.14 **Inspection of Payroll Records:** The Company agrees to make available for inspection within five (5) days after written request by the Union, its payroll records with respect to any employee covered by this Agreement about whom a specific grievance has been filed. The Company shall not be considered as having violated the terms of this agreement should it refuse a request for such inspection before the opening of its business hours or after the close thereof, or on a Saturday, Sunday, or

Holdiay. The Company agrees to open its payroll records with respect to the employees covered herein, when the Union by an independent audit, have reason to believe that the contract has or is being violated.

Section 20.15 **Charge on Hourly Basis:** All local moving where origin and destination is within the St. Louis Metropolitan Area (except five pieces or less, and except services rendered to any department of the Federal Government), shall be done on the hourly basis. Any approximating, estimating or guaranteeing of times shall be a violation of this contract.

Section 20.16 **Liability by Individual Company:** It is understood that any liability for the payment of any sums of money or any other liability which devolves upon any individual company covered by this agreement by virtue of any of the provisions of this agreement, will be borne and discharged by that individual company and is not and will not be assumed by or imposed upon any of the other companies covered by this agreement, nor does any one company covered by this agreement assume any responsiblity, liability or an obligation of any other company.

ARTICLE XXI DIRECT BREACH OF CONTRACT

In the event that the Company clearly, deliberately and willfully violates the monetary provisions of Article XI, Article XII, Article XIII, or Article XIV, and fails to comply with any of the aforesaid articles, five (5) days after written notice given to the Company by the Union by certified mail, the Union shall be free to use its economic power to enforce this contract.

ARTICLE XXII SEPARABILITY AND SAVINGS CLAUSE

If any article or section of this contract or any riders thereto should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if complieance with or enforcement

of any article or section should be restrained by such tribunal pending a final determination as to its validity, the remainder of this contract and of any rider thereto, or the application of such article or section to persons or circumstances other than those as to which it has been held invalid or as to which compliance with or enforcement of has been restrained, shall not be affected thereby.

ARTICLE XXIII FUNERAL LEAVE

An employee shall be paid for any absence from his scheduled work day, Monday through Friday, made necessary to attend the funeral on account of death in the immediate family, up to and including a maximum of three (3) such days, on the basis of eight (8) hours at straight time for each day of such absence. For the purpose of this article, immediate family means mother, father, spouse, brother, sister, a child of the employee, and mother- in-law, father-in-law, brother-in-law, and sister-in-law. The Company may request proof of the bona-fide nature of the necessary absence, including the occurrence of the death, the relationship of the employee to the deceased, and the employee's attendance at the funeral.

ARTICLE XXIV JURY DUTY

When regular employees covered by this Agreement are called upon for jury duty, they shall promptly advise their employer upon receipt of such call, and, if taken from their work for such service, shall be paid eight (8) hours pay at their regular hourly rate less pay received from above duty, for each day of absence from work occasioned thereby. A maximum of ten (10) days jury duty will be allowed during the life of this Agreement.

ARTICLE XXV TERMINATION

This Agreement shall become effective as of the first day of March, 1976 and shall remain in full force and effect until the 28th day of February, 1979, and each year thereafter, unless

written notice of termination or desired modification is given at least sixty (60) days prior to any yearly expiration date by either of the parties hereto.

Should notice of termination or desired modification be given in the manner provided for above, the party desiring the same shall:

1. Offer to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modification.

2. Notify the Federal Mediation and Conciliation service within thirty (30) days after such notices of the existence of a dispute, and simultaneously therewith notify any state agency established to mediate disputes within the state provided no agreement has been reached by that time.

3. Continue in full force and effect, without resorting to strike or lock-out, all the terms and conditions of this agreement for a period of sixty (60) days after such notice is given or until the expiration date of this contract, whichever occurs later. In the process of bargaining in good faith, for a new contract ora contract containing the desired modifications, the parties recognize the fact that it may be necessary to continue their negotiations after the date upon which this agreement legally terminates and in order to provide for their duties and obligations for the period of time between the termination date of this contract and the date upon which they conclude a new contract or one containing the desired modifications, it is understood and agreed as follows:

1. The parties shall continue to bargain and negotiate in good faith in an effort to reach a complete agreement and understanding covering the terms and provisions of a new contract to take the placeof this one or a contract containing the desired modifications, and such negotiations shall continue until either a complete agreement and understanding is reached or until either or both parties conclude that it is not probable that further negotiations will result in agreement.

2. All of the terms and provisions of this contract shall be continued in full force and effect and extended from the termination date hereof, to such time as the parties either enter into a new agreement or agreement containing the desired modifications, or terminate further negotiations in the manner above mentioned.

3. Should the parties reach an agreement upon the terms and provisions of a new contract or a contract containing the desired modifications, at a time subsequent to the termination date of this contract, then, in such event all of the terms and provisions of the new contract, or the contract containing the desired modifications, shall be made retroactive to the termination date of this contract.

The Post Office Address of _____
is _____.

The Post Office Address of the Union is 300 South Grand Boulevard, St. Louis, Missouri, 63103.

IN WITNESS WHEREOF, the parties hereto have signed and executed this and several other copies hereto, the day and year first above written.

COMPANY Schneider Mov. &
Stge. Co.
6400 Spencer Pl.
St. Louis, Mo. 63133

By: Illegible

MISCELLANEOUS DRIVERS
AND HELPERS LOCAL UNION
NO. 610, affiliated with the
International Brotherhood of
Teamsters, Chauffeurs, Warehousemen and Helpers of America

By: Glen Bayer, Bus. Rep.

EMPLOYEES COMMITTEE

Roger Goray
Charles Peterson
James Bradbury
James Henry
William Roland
Willie Furnace

Office - Supreme Court, U.S.
FILED
NOV 17 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1860 and 82-1862

In The

Supreme Court of the United States

October Term, 1983

SCHNEIDER MOVING & STORAGE COMPANY, *Petitioner,*
and
PROSSER'S MOVING AND STORAGE COMPANY, *Petitioner,*

vs.

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD MCDOUGALL, THOMAS F. O'MALLEY, AND R. V. PULLIAM, TRUSTEES OF THE CENTRAL STATES, AND SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, A PENSION TRUST, *Respondents,*
and
LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD MCDOUGALL, THOMAS F. O'MALLEY, AND R. V. PULLIAM, TRUSTEES OF THE CENTRAL STATES, AND SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE, A HEALTH AND WELFARE TRUST, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITIONS FOR CERTIORARI FILED MAY 17, 1983.
CERTIORARI GRANTED AND CASES CONSOLIDATED OCTOBER 3, 1983.

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Nos. 82-1860 and 82-1862

In The

Supreme Court of the United States

October Term, 1983

SCHNEIDER MOVING & STORAGE COMPANY, *Petitioner,*

and

PROSSER'S MOVING AND STORAGE COMPANY, *Petitioner,*

vs.

LORAN W. ROBBINS, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
	District Court Docket Entries in No. 82-1860 (Schneider)
4/21/80	Plaintiff's Complaint filed in the United States District Court for the Eastern District of Missouri, Eastern Division.
6/ 5/80	Answer of Defendant Schneider filed.
10/20/80	Defendant Schneider's Motion to Dismiss filed.
11/ 7/80	Memorandum and Order of Dismissal entered.
12/ 2/80	Plaintiffs' Notice of Appeal filed.

District Court Docket Entries in No. 82-1862 (Prosser's)

3/19/80	Plaintiffs' Complaint filed in U. S. District Court for Eastern District of Missouri, Eastern Division.
5/ 8/80	Defendant Prosser's Answer filed.
9/ 2/80	Defendant Prosser's Motion to Dismiss or for Summary Judgment filed.
11/ 7/80	Memorandum and Order of Dismissal filed.
12/ 2/80	Plaintiffs' Notice of Appeal filed.

Court of Appeals Docket Entries (Consolidated Cases)

3/24/82	Opinion with Dissent, and Judgment of the Court of Appeals for the Eighth Circuit filed.
4/ 7/82	Petition for Rehearing *en banc* filed.
6/ 4/82	Order granting Petition for Rehearing *en banc* granted.
2/16/83	Opinion, with Dissent, and Judgment of the Court of Appeals for the Eighth Circuit filed.
3/14/83	Judgment of Court of Appeals entered.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Cause No. 80-0535-C(B)

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY and R. V. PULLIAM, the present trustees of CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust,

and

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY AND R. V. PULLIAM, the present trustees of CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND, a health and welfare trust,

Plaintiffs,

vs.

SCHNEIDER MOVING AND STORAGE COMPANY, a Missouri corporation,

Defendant.

COMPLAINT

(Filed April 21, 1980)

Now come the Plaintiffs, by their attorneys, LaTourette and Weyerich, by Donald J. Weyerich and as and for a cause of action against the Defendant allege and show to the Court as follows:

I.

JURISDICTION

1. Jurisdiction of this Court is founded upon: Section 301(a) of the Labor Management Relations Act of

1947, as amended, (29 USC Section 185 (a)); and Section 502 of the Employee Retirement Income Security Act of 1974 (29 USC 1132) in that the Plaintiffs are aggrieved by the Defendant's violation of the Collective Bargaining Agreements, Pension Plan and Pension Agreement and the Defendant's continued refusal to comply with certain terms of Collective Bargaining Agreements and Trust Plan and Trust Agreement of the Central States, Southeast and Southwest Areas Pension Fund and the Central States, Southeast and Southwest Areas Health and Welfare Fund thereby violating the provisions of the Employee Retirement Income Security Act of 1974, the terms and provisions of the employee benefit plans, Section 301 of the Labor Management Relations Act of 1947 and the Common Law of the State of Missouri.

II.

PARTIES

2. Plaintiffs Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley and R. V. Pulliam, hereinafter referred to as "The Trustees" are trustees of the Central States, Southeast and Southwest Areas Pension Fund, a common law pension trust established by trust agreement and an employee benefit plan, with its principal place of business in Chicago, Illinois, hereinafter referred to as "The Pension Fund"; and bring this action on behalf of the Trustees, their predecessors and/or successors, and the participants and beneficiaries of the Pension Fund, and the Pension Fund.

3. Plaintiffs Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard Mc-

Dougall, Thomas F. O'Malley and R. V. Pulliam, hereinafter referred to as "The Trustees" are the trustees of the Central States, Southeast and Southwest Areas Health and Welfare Fund, a common law health and welfare trust, established by trust agreement and an employee benefit plan, with its principal place of business in Chicago, Illinois, hereinafter referred to as "The Health and Welfare Fund"; and bring this action on behalf of the Trustees, their predecessors and/or successors, and the participants and beneficiaries of the Health and Welfare Fund, and the Health and Welfare Fund.

4. Defendant Schneider Moving and Storage Company, a Missouri corporation, is a citizen of the State of Missouri, a public mover, with its office and principal place of business at 6400 Spencer Place, and is transacting business within the County of St. Louis, State of Missouri.

III.

NATURE OF CLAIMS

5. Defendant is an employer and a party in interest in an industry affecting commerce within the meaning of Section 3 (5), (11), (12) and (14) of the Employee Retirement Income Security Act of 1974 (29 USC 1002 (5), (11), (12) and (14)) and the Labor Management Relations Act of 1947 (29 USC 151 *et seq.*).

For all times relevant herein, Defendant was a party to and agreed to abide by the terms of Collective Bargaining Agreements between itself and Local Union No. 610, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

America which is a labor organization that represented for the purpose of collective bargaining certain employees of Defendant and employees of other employers in industries affecting interstate commerce within the meaning of Sections 2 (5), 9 (a), and 301 (a) of the Labor Management Relations Act of 1947, as amended (29 USC 151 *et seq.*).

6. That on or about March 1, 1970, Defendant entered into a Master Agreement for Public Movers of the Greater Metropolitan St. Louis and St. Louis County areas of Missouri for the period March 1, 1970 through February 28, 1973 (See Exhibit 1) with Local Union No. 610, which Agreement provided for specific payments to the Health and Welfare Fund and Pension Fund for each employee covered by said Agreement.

7. That on or about March 1, 1973, Defendant entered into a Master Agreement for Public Movers of the Greater Metropolitan St. Louis and St. Louis County areas of Missouri for the period March 1, 1973 through February 28, 1976 (See Exhibit 2) with Local Union No. 610, which Agreement provided for specific payments to the Health and Welfare Fund and Pension Fund for each employee covered by said Agreement.

8. That on or about March 1, 1976, Defendant entered into a Master Agreement for Public Movers of the Greater Metropolitan St. Louis and St. Louis County areas of Missouri for the period March 1, 1976 through February 28, 1979 (See Exhibit 3) with Local Union No. 610, which Agreement provided for specific payments to the Health and Welfare Fund and Pension Fund for each employee covered by said Agreement.

9. As provided in the Collective Bargaining Agreements and Pension Trust Agreement (See Exhibit 4 attached hereto), Pension Plan (See Exhibit 5), Health and Welfare Trust Agreement (See Exhibit 6), Joint Application (See Exhibit 7) and Participation Agreement (See Exhibit 8), Plaintiffs, as Trustees aforesaid, are required to receive, hold and manage all monies required to be contributed to Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds in accordance with the provisions of the then applicable Collective Bargaining Agreement, as a Trust Fund, for the uses and purposes set forth in the Agreement and Pension Trust Agreement and Welfare Trust Agreements governing the Fund to which the contributions are made.

10. By virtue of provisions contained in the Collective Bargaining Agreements to which Defendant was bound, Defendant did promise and become obligated to make contributions, in amounts set forth therein, to said Pension and Health and Welfare Funds on behalf of its employees for each hour worked or for which wages were received by such employees.

Defendant agreed that all amounts required to be paid into the said Pension and Health and Welfare Funds, as above set forth, shall be paid not later than the 15th day of the month next succeeding the month in which an employee covered by the collective bargaining agreement worked or received wages.

Defendant further agreed to furnish to the Trustees of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds in each month, not later than the 15th day of the month next succeeding, a monthly contribution report, setting forth therein:

(a) the names and social security numbers of employees

(b) hours for which wages were received by the employee

(c) contributions required to be made on behalf of each employee

or in such cases where no employee worked or received wages, a statement to that effect and indicating no contributions were required to be made for such period.

Each Employer bound by the collective bargaining agreement has agreed that a failure by an Employer to make payment of contributions required to be made thereunder shall constitute a violation of said agreement by such Employer.

11. Pursuant to provisions contained in the Collective Bargaining Agreement and Health and Welfare and Pension Trust Agreements, the Trustees acting thereunder are authorized and empowered to examine and copy the payroll books and records of an Employer to permit such Trustees to determine whether an Employer is making full payment as required under the applicable Collective Bargaining Agreement.

It is further provided therein, that in the event upon an audit made by the Trustees and/or upon other evidence it shall be found that an Employer has failed to make all contributions required on such Employer's part to be made, Trustees shall impose the following upon such delinquent Employer:

(a) all costs of such audit shall be paid by such Employer

(b) all costs, expenses, interest on monies due at the rate of 8 percent (8%) per annum, and attorney's fees incurred by the Trustees

12. Notwithstanding the foregoing, Defendant has violated the obligations on Defendant's part undertaken, in that the Defendant has failed:

To allow the Trustees to make proper audit of Defendant's payroll books and records to determine amounts due to Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund.

To furnish to the Trustees of Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund the required monthly statement as required by the collective bargaining agreement.

In addition to the foregoing, Defendant has repeatedly failed to make contribution reports and the required payments thereon upon their respective due dates.

13. By the above described omissions and breaches of Agreement by the Defendant:

The Trustees of the Central States, Southeast and Southwest Areas Pension Trust Fund may be required to deny the employee-beneficiaries of such fund, for whom required contributions have not been made, the benefits provided thereunder, thereby causing to such employee-beneficiary substantial and irreparable damage.

The Trustees of the Central States, Southeast and Southwest Areas Health and Welfare Fund will be required to provide to employees of Defendant benefits provided thereunder notwithstanding the failure of Defendant to make required contributions thereto, thereby reducing the corpus of such Fund and endangering the rights of employee-beneficiaries there-

under on whose behalf contributions are being made, all to their substantial and irreparable injury.

14. Plaintiffs, in their behalf and on behalf of all employees for whose benefit the Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund have been established, have requested Defendant to perform its obligations, but Defendant has refused and failed to perform as herein alleged.

15. Plaintiffs are without an adequate remedy at law and will suffer immediate, continuing and irreparable injury, loss and damage unless Defendant is ordered to specifically perform all obligations on Defendant's part required to be performed under the Collective Bargaining Agreements, Pension Agreement, Health and Welfare Trust Agreement, Joint Application and Participation Agreement, and is restrained from continuing to refuse to perform as thereunder required.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand the following relief:

1. That an account be taken as to all employees of Defendant covered by the Collective Bargaining Agreement, as to wages received and hours worked by such employees to determine amounts required to be paid to the Trustees of the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds, covering the periods for which the collective bargaining agreements are effective.

2. That Defendant be decreed to pay to the Trustees of the Central States, Southeast and Southwest Areas

Health and Welfare and Pension Funds all sums determined to be due, together with interest on all monies due at the rate of 8 percent (8%) per annum.

3. That Defendant be specifically required to perform and continue to perform all obligations on Defendant's part undertaken, particularly to furnish to the Trustees of Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds the required monthly contribution report heretofore referred to, or in lieu thereof, a statement covering the period for which said report is required that Defendant had no employees for whom contributions are required to be made.

4. That Defendant be decreed to pay all costs attendant to any audit of Defendant's payroll books and records.

5. That Defendant be decreed to pay to the Trustees their reasonable attorney's fees all as in the Health and Welfare and Pension Trust Agreements.

6. Plaintiffs have such other and further relief as by the Court may be deemed just and equitable, all at Defendant's costs.

LaTOURETTE AND WEYERICH

By /s/ Donald J. Weyerich #20191
Attorney for Plaintiffs
11 South Meramec - Suite 1400
Clayton, Missouri 63105
(314) 727-0777

(Exhibits omitted in printing, except for exhibits 3 and 4 and excerpts from exhibits 1 and 2, printed below.)

EXCERPT FROM PLAINTIFFS' EXHIBIT 2, ATTACHED TO PLAINTIFFS' COMPLAINT AGAINST SCHNEIDER—SECTION 12.2 OF COLLECTIVE BARGAINING AGREEMENT EFFECTIVE MARCH 1, 1973 TO FEBRUARY 28, 1976

• • • •

Section 12.2. A new employee without previous experience in the Moving Industry in St. Louis may be hired at the rate of 80¢ per hour less than the scale for the classification of work for which hired, provided that his hourly rate is adjusted automatically 10¢ an hour upon the completion of every 30 calendar days of employment until the classification rate of Section 12.1 is attained. An employee with work experience with companies which are members of this Association, when referred by the Union, shall be paid at the rate stated for his classification.

Casual, temporary, or part-time employees, exclusive of employees who regularly report to the union employment office, may be hired at the rate of $2.50 per hour. A casual or temporary employee is one who, hired for the day, and without promise of continued employment, is terminated upon the completion of the day. A part-time employee is one who normally has a regular job elsewhere. A seasonal employee may be hired at the rate of $2.50 per hour for his first season with the Industry, $2.75 per hour for his second season with the Industry, $3.00 an hour for his third season with the Industry, and $3.25 an hour for his (sic) fourth season with the Industry. A seasonal employee is one, such as a student, who is hired for a seasonal period customarily between May 15th and September 15th. With respect to seasonal employees the company agrees that,

within 31 days following employment a seasonal employee shall not be permitted to work unless, or until, he submits to the company official proof supplied by the Union that he has become a member or has applied for membership in the Union.

• • • •

EXCERPT FROM PLAINTIFFS' EXHIBIT 1, ATTACHED TO PLAINTIFFS' COMPLAINT AGAINST SCHNEIDER—SECTION 12.2 OF COLLECTIVE BARGAINING AGREEMENT EFFECTIVE MARCH 1, 1970 TO FEBRUARY 28, 1973

• • • •

Section 12.2. A new employee without previous experience in the Moving Industry in St. Louis may be hired at the rate of 80¢ per hour less than the scale for the classification of work for which hired, provided that his hourly rate is adjusted automatically 10¢ an hour upon the completion of every 30 calendar days of employment until the classification rate of Section 12.1 is attained.

Casual, temporary, seasonal, or part-time employees may be hired at the rate of $2.00 per hour. A casual or temporary employee is one who, hired for the day, and without promise of continued employment, is terminated upon the completion of the day. A seasonal worker is one, such as a student, who is hired for a seasonal period customarily between May 15 and September 15. A part-time worker is one who normally has a regular job elsewhere.

An employee with work experience with companies which are members of this Association, when referred by the Union, shall be paid at the rate stated for his classification. The Company agrees that, within 31 days following employment, a seasonal employee shall not be permitted to work unless or, until he submits to the Company official proof supplied by the Union that he has become a member, or has applied for membership, in the Union.

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REVISED AND AMENDED TRUST AGREEMENT FOR CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

This AGREEMENT and DECLARATION of TRUST, made and entered into this sixteenth day of March, 1955, by and between CENTRAL CONFERENCE OF TEAMSTERS, SOUTHERN CONFERENCE OF TEAMSTERS, and their affiliated Local Unions, hereinafter referred to collectively as the "UNION" and the SOUTHEASTERN AREA MOTOR CARRIERS LABOR RELATIONS ASSOCIATION; SOUTHWEST OPERATORS ASSOCIATION; NATIONAL AUTOMOBILE TRANSPORTERS LABOR COUNCIL; MOTOR CARRIERS EMPLOYERS CONFERENCE—CENTRAL STATES; CARTAGE EMPLOYERS MANAGEMENT ASSOCIATION; CLEVELAND DRAYMEN ASSOCIATION, INC.; and NORTHERN OHIO MOTOR TRUCK ASSOCIATION, INC.; for and on behalf of themselves, their constituent members, and such other Employers

who are or may become parties hereto, hereinafter collectively referred to as the "EMPLOYER" and the individual Trustees, hereinafter referred to as the "TRUSTEES" selected as hereinafter described, accepting the Trust obligations herein declared:

WITNESSETH:

WHEREAS, the Union and the Employer believe that it is in the best interest of the Employees of such Employer represented by the Union, and the families and dependents of such Employees, to provide for retirement benefits and for that purpose to establish a Trust Fund as hereinafter provided; and

WHEREAS, the Union and the Employer have heretofore entered into collective bargaining agreements under the terms of which it is provided that the Employer shall contribute certain agreed-upon sums of money therein set forth to a Pension Fund, which shall be known as the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; and

WHEREAS, Employee Trustees and Employer Trustees have been designated as the Trustees of the Trust in accordance with the provisions of such Agreement.

NOW THEREFORE, for and in consideration of the premises and of the mutual covenants and agreements herein contained, the Union and the Employer hereby accept and adopt all of the provisions herein contained, and the Trustees declare that they will receive and hold the contributions and any other money or property which may come into their hands as Trustees (all such contributions, money and property being hereinafter referred

to as "the Trust Fund"), with the powers and duties, uses, and purposes as hereinafter set forth, to-wit:

ARTICLE I

DEFINITION OF TERMS

Sec. 1. *Employer*—The term "Employer" as used herein shall mean any employer who is bound by a collective bargaining agreement with the Union, or any employer not presently a party to such collective bargaining agreement who satisfies the requirements for participation as established by the Trustees and agrees to be bound by this Agreement.

Sec. 2. *Union*—The term "Union" as used herein shall mean the CENTRAL CONFERENCE OF TEAMSTERS, THE SOUTHERN CONFERENCE OF TEAMSTERS, and their affected affiliated Local Unions, and such other unions as the Trustees may agree upon.

Sec. 3. *Employee* — The term "Employee" as used herein shall include:

(a) A person who is employed under the terms and conditions of a collective bargaining agreement entered into between an Employer as herein defined and a Union as herein defined, and on whose behalf payments are required by such collective bargaining agreement or applicable law to be made to the Fund by the Employer; or

(b) All persons employed by the Union, upon being proposed by the Union and after acceptance by the Trustees; and as to such Union personnel the Union shall be considered an Employer solely for the purposes of contributions within the meaning of this Agreement and Declaration of Trust and shall, on behalf of such personnel, make pay-

ments to the Trust at the times and at the rate of payment equal to that made by any other Employer who is a party to the Trust for the same benefits; or

(c) All persons employed by the Central States, Southeast and Southwest Areas Pension Fund or Central States, Southeast and Southwest Areas Health and Welfare Fund upon acceptance by the Trustees; and as to such Trust personnel the Trustees shall be deemed an Employer, solely for the purpose of contributions, within the meaning of this Agreement and Declaration of Trust and shall, on behalf of such personnel, make payments to the Trust at the times and at the rate of payment equal to that made by any other Employer who is a party to the Trust for the same benefits.

(d) All persons who are Trustees of Central States, Southeast and Southwest Areas Pension Fund or Central States, Southeast and Southwest Areas Health and Welfare Fund upon acceptance by the Trustees, as hereinafter defined; and on behalf of such persons who are Trustees, their Employers shall make or be presently required to make contributions to the Trust at the times and at the rate of payment equal to that required by any other Employer who is a party to the Trust for the same benefits.

(e) In all instances the common law test, or the applicable statutory definition; or master-servant relationship shall control employee status.

(f) The continuation of employee status once established shall be subject to such reasonable rules as the Trustees may adopt according to law.

Sec. 4. *Trustees*—The term "Trustees" or "Board" as used herein shall mean the Trustees designated in this Agreement and Declaration of Trust together with their

successors designated and appointed in accordance with the terms of this Agreement.

Sec. 5. *Trust Fund or Fund*—The term "Trust Fund" or "Fund" as used herein shall refer to all property of whatever nature which shall be in said Trust created by this Agreement.

Sec. 6. *Employer Contributions*—The term "Employer Contributions" as used herein shall mean payments made by Employers to the Trust Fund herein created.

ARTICLE II

CREATION OF TRUST FUND AND BOARD OF TRUSTEES

Sec. 1. *Designation*—The Union and the Employer hereby create and establish, with the Trustees herein provided for, a Trust to be known as the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND which shall be comprised of assets derived from Employer contributions made pursuant to the collective bargaining agreement between the parties (plus any additional sum or sums, from Employer contributions which may hereafter be agreed upon by the Employers and the Union set forth in written collective bargaining agreements), together with all insurance and annuity contracts (including dividends, refunds, or other sums payable to the Trustees on account of such insurance and annuity contracts) and all investments made and held by the Trustees on account of such insurance and annuity contracts, all investments made and held by the Trustees, all moneys received by the Trustees as contributions or as income from investments made and held

by the Trustees or otherwise, and any other property received and held by Trustees for the uses, purposes, and trusts set forth in this Agreement and Declaration of Trust, where any of the foregoing is derived from the Employer contributions.

Sec. 2. *Board of Trustees*—There is hereby created a Board of Trustees consisting of four (4) persons representative of the Employers and four (4) persons representative of the Employees. The Employer Trustees shall be designated as follows: One (1) Trustee shall be designated by each of the following Employer groups, acting either alone or jointly as herein indicated:

A. Southeastern Area Motor Carriers Labor Relations Association and Southwest Operators Association;

B. Cleveland Draymen Association, Inc., Northern Ohio Motor Truck Association, Inc., and Cartage Employers Management Association.

Two (2) Trustees shall be designated by the following Employer group:

C. Motor Carriers Employers Conference—Central States.

The Employee Trustees shall be designated jointly by the Union, as defined in Article I, Section 2 of this Agreement.

Sec. 3. *Term of Trustees*—Each Trustee shall serve as such Trustee until he shall die, become incapable of acting hereunder, resign, become unqualified for the position under applicable law, or be removed as herein provided.

Sec. 4. *Manner of Acting in Event of Deadlock*—In the event a deadlock develops between the Employer and

Employee Trustees, or between the Trustees, the Trustees shall appoint a neutral party empowered to break such deadlock within a reasonable length of time. Such neutral party may be appointed in advance of any such deadlock. In the event the Trustees are unable to agree upon a neutral party, or in the event such neutral party is unable to act, either the Employer or the Employee Trustees may petition the District Court of the United States for the Northern District of Illinois, Eastern Division, for appointment of a neutral person, as provided in Section 302 (c) of the Labor Management Relations Act of 1947, as amended.

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Sec. 6. *Removal of Trustees*—Any Employer Trustee may be removed, with or without cause, at any time by the Employer Association or Group appointing such Employer Trustee; in the event of such removal of such Employer Trustee, the Employer Association or Group removing such Trustees shall appoint a Successor Trustee. Any Employee Trustee may be removed, with or without cause, at any time by the Union. The Trustees shall also have the authority and duty to act to remove a Trustee holding office in violation of law.

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Sec. 9. *Office of the Fund*—The sole and principal office of the Fund shall be in Chicago, Illinois, for the transaction of business of the Fund, the exact location of which is to be made known to the parties interested in such Fund. At such office, and at such other places as may be required by law, there shall be maintained all, or

any of, the books and records pertaining to the Fund and its administration.

Sec. 10. *No One Is Agent Without Written Authority* —No individual or person may act as agent for the Fund unless specifically authorized in writing by the Trustees. No Employer or Union nor any representative of any Employer or Union, in such capacity, is authorized to interpret the Pension Plan, nor can any such person act as agent of the Trustees. Only the Board of Trustees is authorized to interpret the Pension Plan within the scope of its authority.

ARTICLE III

CONTRIBUTIONS AND COLLECTIONS

Sec. 1. *Amount of Contributions*—Each Employer shall make continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement between the parties. The obligation to make such contributions shall continue during periods when the collective bargaining agreement is being negotiated, but such contributions shall not be required in case of strike after contract termination, unless the parties mutually agree otherwise.

Sec. 2. *Time of Payment*—The Trustees shall, by regulation, fix the time of payment for contributions and shall send a copy of such regulations to each Employer required to contribute.

Sec. 3. *Receipt of Payment and Other Property of Trust*—The Trustees are hereby designated as the persons to receive the payments heretofore or hereafter made by the Employers to the Trust Fund, and the Trus-

tees are hereby vested with all right, title and interest in and to such moneys and all interest accrued thereon, and are authorized to receive and be paid the same. The Trustees agree to receive all such payments, deposits, moneys, insurance and annuity contracts, and other assets and properties described or referred to in Article II and this Article, and to hold same in Trust hereunder for the uses and purposes of the Trust herein created.

Sec. 4. *Collections and Enforcement of Payment*—The Trustees, or such committee of the Trustees as the Board of Trustees shall appoint, or the Executive Director when directed by such committee or by the Trustees, shall have the power to demand and collect the contributions of the Employers to the Fund. Said Board of Trustees shall take such steps, including the institution and prosecution of, and intervention in, any legal proceedings as the Trustees in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions or other amounts which may be owed to the Trust Fund, without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purpose. The Trustees are authorized to receive all Employer contributions and apply such contributions first to any interest due, and then to the oldest unpaid balance of contributions due. Nothing herein shall give any Employer the right to designate how any contributions shall be applied.

Sec. 5. *Production of Records*—Each Employer shall promptly furnish to the Trustees, upon reasonable demand, the names and current addresses of its Employees, their Social Security numbers, the hours worked by each Employee and past industry employment history in its

files and such other information as the Trustees may reasonably require in connection with the administration of the Trust. The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust. All Employers shall annually furnish to the Trustees, if requested by them, a statement showing whether:

(a) the organization is a corporation and the names of all of its officers;

(b) if not a corporation, a certificate stating that it is either a partnership or an individual proprietorship and the names of the partners or the name of the individual proprietor.

The Union will comply with any reasonable request of the Trustees to examine those records of the Union which may indicate the employment record of any Employee whose status is in dispute. The names and addresses of participants and beneficiaries are confidential information not to be disclosed by the Trustees except as required by an order of a court of competent jurisdiction, except where necessary for determination of benefits in accordance with the provisions of this Trust Agreement, or as required by law.

ARTICLE IV

POWERS AND DUTIES OF TRUSTEES

Sec. 1. The Trustees shall have authority to control and manage the operation and administration of the Trust in accordance with applicable law.

Sec. 2. The Trustees shall hold, manage, care for, and protect the Trust Fund and collect the income therefrom and contributions thereto, except to the extent that any of these functions or responsibilities are assigned to another entity or entities pursuant to any provision of this Article.

* * *

Sec. 6. The Trustees shall engage one or more independent qualified public accountants and enrolled actuaries to perform all services required by and in accordance with applicable law and such other services as the Trustees deem necessary.

Sec. 7. The Trustees, to the extent permitted by applicable law, shall incur no liability in acting upon any instrument, application, notice, request, signed letter, telegram, or other paper or document believed by them to be genuine and to contain a true statement of facts, and to be signed by the proper person.

* * *

Sec. 9. The Trustees are hereby authorized to formulate and promulgate any and all necessary rules and regulations which they deem necessary or desirable to facilitate the proper administration of the Trust, provided the same are not inconsistent with the terms of the Agreement, and the Articles in the Central States, Southeast and Southwest Areas Agreements creating the Pension Fund. All rules and regulations adopted by action of the Trustees for the administration of the Trust Fund shall be binding upon all parties hereto, all parties dealing with the Trust, and all persons claiming any benefits hereunder.

* * *

Sec. 11.

(a) The Trustees may assign, from time to time, various administrative matters to such committees and subcommittees of Trustees, or to such other individuals or organizations, as they may deem necessary or appropriate in their sole discretion. The Trustees may also assign and delegate, from time to time, specified Trustee responsibilities to committees and subcommittees of Trustees, as they deem necessary or appropriate in their sole discretion. Committees and subcommittees of Trustees shall consist of an equal number of Employer and Employee Trustees.

* * *

Sec. 13. The Trustees shall, by regulation, establish rules relating to payments of contributions by Employers for Employees during periods of such Employees' illness or disability and related matters but not contrary to applicable collective bargaining agreements.

Sec. 14. The Trustees are hereby empowered, in addition to such other powers as are set forth herein or conferred by law:

(a) To enter into any and all contracts and agreements for carrying out the terms of this Agreement and Declaration of Trust and for the administration of the Trust Fund, and to do all acts as they, in their discretion, may deem necessary or advisable, and such contracts and agreements and acts shall be binding and conclusive on the parties hereto and on the Employees involved.

* * *

(e) To do all acts, whether or not expressly authorized herein, which the Trustees may deem neces-

sary or proper for the protection of the property held hereunder.

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Sec. 15. The Employer Trustees and Employee Trustees shall not be paid any compensation for their services hereunder for attendance at regular or special meetings of the Trustees; but the Trustees may be reimbursed for expenses properly and actually incurred for attending regular or special meetings of the Trustees or committees or subcommittees or while performing specific assignments; provided, further, that the Trustees who are not receiving full-time pay from an Employer, Employer Association or Union may be paid reasonable compensation on a per hour and/or per day basis for services rendered as a member of a committee, subcommittee, or while performing specific assignments, which rate shall be established and reestablished by the Trustees from time to time. Any such request for expense reimbursement and/or compensation shall be submitted on a voucher form approved by the Trustees.

Sec. 16. The Trustees shall use and apply the Trust Fund for the following purposes:

• • •

(b) To pay or provide for the payment of retirement and related benefits to eligible Employees in accordance with the terms, provisions and conditions of the Pension Plan to be formulated and agreed upon hereunder by the Trustees.

Sec. 17. The Trustees, by majority action, shall have the power to construe the provisions of this Agreement and the terms and regulations of the Pension Plan; and any construction adopted by the Trustees in good faith

shall be binding upon the Union, Employees and Employers.

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ARTICLE V

CONTROVERSIES AND DISPUTES

Sec. 1. In any controversy, claim, demand, suit at law, or other proceeding between any participant, beneficiary, or any other person and the Trustees, the Trustees shall be entitled to rely upon any facts appearing in the records of the Trustees, any instruments on file with the Trustees, with the Union or with the Employers, any facts certified to the Trustees by the Union or the Employers, any facts which are of public records, and any other evidence pertinent to the issue involved.

Sec. 2. All questions or controversies, of whatsoever character, arising in any manner or between any parties or persons in connection with the Fund or the operation thereof, whether as to any claim for any benefits preferred by any participant, beneficiary, or any other person, or whether as to the construction of the language or meaning of the rules and regulations adopted by the Trustees or of this instrument, or as to any writing, decision, instrument or accounts in connection with the operation of the Trust Fund or otherwise, shall be submitted to the Trustees, or to a committee of Trustees, and the decision of the Trustees or of such committee thereof shall be binding upon all persons dealing with the Fund or claiming any benefit thereunder. To the extent this section is contrary to or inconsistent with the June 30, 1977 Agreements, this section shall be inapplicable.

Sec. 3. The Trustees may, in their sole discretion, compromise or settle any claim or controversy in such

manner as they think best, and any decision made by the Trustees in compromise or settlement of a claim or controversy, or any compromise or settlement agreement entered into by the Trustees, shall be conclusive and binding on all parties interested in this Trust. To the extent this section is contrary to or inconsistent with the June 30, 1977 Agreements, this section shall be inapplicable.

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ARTICLE VII

ESTABLISHMENT OF PENSION PLAN

Sec. 1. Formulation of Plan — The Trustees shall formulate a Pension Plan for the payment of such retirement pension benefits, permanent disability pension benefits, death benefits, and related benefits, as are feasible. Such Pension Plan shall at all times comply with all applicable federal statutes and regulations and with the provisions of this Trust Agreement. The Trustees shall not be under any obligation to pay any pension if the payment of such pension will result in loss of the Funds's tax exempt status under the then applicable Internal Revenue Code and any regulations or rulings issued pursuant thereto. The Trustees shall draft procedures, regulations, and conditions for the operation of the Pension Plan, including, by way of illustration and not limitation: conditions of eligibility for covered Employees, procedure for claiming benefits, schedules of type and amount of benefits to be paid, and procedure for the distribution of benefits. The Trustees may also provide for the payment of partial pensions, and may enter into agreements with other trustees of pension plans which conform to the applicable sections of the then applicable Internal Revenue

Code for purposes of tax deductions for the reciprocal recognition of service credits and payments of pension benefits based upon such service credits.

Sec. 2. The Trustees shall provide participants and beneficiaries such information as is required by law.

Sec. 3. Amendment of Plan — The Pension Plan may be amended by the Trustees from time to time, provided that such amendments comply with the applicable sections of the then applicable Internal Revenue Code, all applicable federal statutes and regulations, the contract articles creating the Pension Fund, and the purposes as set forth in this Agreement. Additionally and not by way of limitation, the Trustees may amend the Pension Plan, in future, or retroactively, where they deem it necessary to maintain the continuation of the Fund's tax exempt status or to preserve compliance with the then applicable Internal Revenue Code, applicable federal statutes, and any regulations or rulings issued with respect thereto. A copy of each amendment of the Pension Plan shall be adopted and filed by the Trustees as part of the records and minutes of the Trustees, and one copy thereof shall be distributed to the Union and to each Employer or Employer Group signatory to this Trust Agreement.

* * *

ARTICLE IX

PAYMENTS TO PERSONS UNDER LEGAL DISABILITY

In case any benefit payments hereunder become payable to a person under legal disability, or to a person not adjudicated incompetent but, by reason of mental or phys-

ical disability, in the opinion of the Trustees, is unable to administer properly such payments, then such payments may be paid out by the Trustees for the benefit of such person in such of the following ways as they think best, and the Trustees shall have no duty or obligation to see that the payments are used or applied for the purpose or purposes for which paid:

(a) directly to any such person;

(b) to the legally appointed guardian or conservator of such person;

(c) to any spouse, parent, brother, or sister of such person for his welfare, support and maintenance;

(d) by the Trustees using such payments directly for the support, maintenance and welfare of any such person.

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ARTICLE XI

TERMINATION OF TRUST

Sec. 1. This Trust shall cease and terminate upon the happening of any one or more of the following events:

(a) In the event the Trust Fund shall be, in the opinion of the Trustees, inadequate to carry out the intent and purpose of this Agreement, or to meet the payments due or to become due under this Agreement to persons already drawing benefits.

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ARTICLE XII

EXTENSION OF PLAN

The Trustees are authorized to extend the coverage of this Agreement and Trust to such other Employers

and Employees as such Trustees shall agree upon, provided such Employers and Employees are required to conform to the terms and conditions of the Trust and to make the same rate of payments required of the Employers herein, for the same benefits.

ARTICLE XIII

VESTING OF RIGHTS

The Trustees shall establish standards for the vesting of benefits which conform to no less than the minimum standards required by law. No Employee or other person shall have any vested interest or right in the Trust Fund except as provided by the Trustees in conformance with applicable law.

ARTICLE XIV

MISCELLANEOUS

Sec. 1. In no event shall the Employers, directly or indirectly, receive any refund on contributions made by them to the Trust, except in case of bona fide mistake, and as to which contributions are returned within one year after payment of the contributions, nor directly or indirectly participate in the disposition of the Trust Fund or receive any benefits from the Trust Fund. Upon transfer of each contribution to the Trustees, all responsibilities of the Employers for such contributions shall cease, and the Employers shall have no responsibilities for the acts of the Trustees. No Employee shall have any individual right, title, interest, or claim against any Employer, Employer's contribution, or the Trust Fund, except as may be expressly provided for in this Agreement or under federal law.

Sec. 2. The Union or the Employer may, at any time, demand of the Trustees an accounting with respect to any and all accounts upon agreement to pay necessary expenses thereof. The Trustees shall be entitled, at any time, to have a judicial settlement of their accounts and judicial determination of any questions in connection with the administration or distribution thereof. Any Trustee who has resigned, been removed from office, or not been reappointed shall execute all instruments necessary to transfer the Trust Fund.

Sec. 3. In the event any question or dispute shall arise as to the proper person or persons to whom any payments shall be made hereunder, the Trustees may withhold such payment until an adjudication of such question or dispute, satisfactory to the Trustees, in their sole discretion, shall have been made, or the Trustees shall have been adequately indemnified against loss to their satisfaction.

Sec. 4. Non-payment by an Employer of any moneys due shall not relieve any other Employer from his obligation to make payment. In addition to any other remedies to which the parties may be entitled, an Employer shall be obligated to pay interest at the rate of eight (8) per cent per annum on the moneys due to the Trustees from the date when the payment was due to the date when the payment is made, together with all expenses of collection incurred by the Trustees, including, but not limited to, attorneys' fees and such fees for late payment as the Trustees determine and as permitted by law.

Sec. 5. Where used in this Agreement, words in the masculine shall be read and construed as in the feminine,

and words in the singular shall be read and construed as though used in the plural, in all cases where such construction would so apply.

Sec. 6. The Article titles are included solely for convenience and shall, in no event, be construed to affect or modify any part of the provisions of this Agreement or be construed as part thereof.

Sec. 7. This Agreement shall in all respects be construed according to and governed by the laws of the State of Illinois, including but not limited to the laws applicable to the rate of interest in the State of Illinois, except as such laws may be preempted by the laws and regulations of the United States.

ARTICLE XV

BENEFICIAL RIGHTS

No Employer or Union, or Employees, shall have any right, title or interest in or to the Trust Fund or any part thereof other than vesting under the Pension Plan except in accordance with applicable law. There shall be no prorata or other distribution of any of the assets of the Fund as a result of any Union, Employer or Group of Employees of Employers ceasing their participation in this Fund for any purpose or reason, except as required by law.

• • •

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Cause No. 80-0535-C(B)

LORAN W. ROBBINS (other plaintiffs' names omitted in printing),

Plaintiffs,

vs.

SCHNEIDER MOVING AND STORAGE COMPANY, A Missouri corporation,

Defendant.

(Filed June 5, 1980)

ANSWER

COMES NOW Defendant, Schneider Moving and Storage Company, and for its Answer to Plaintiffs' Complaint states as follows:

1. Defendant denies the allegation contained in paragraph 1 of Plaintiffs' Complaint.

2. Defendant has insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 2 of Plaintiffs' Complaint, and therefore denies same.

3. Defendant has insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 3 of Plaintiffs' Complaint, and therefore denies same.

4. Defendant admits the allegations contained in paragraph 4 of Plaintiffs' Complaint.

5. Defendant has insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 5 of Plaintiffs' Complaint, and therefore denies same.

6. Defendant has insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 6 of Plaintiffs' Complaint, and therefore denies same.

7. Defendant has insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 7 of Plaintiffs' Complaint, and therefore denies same.

8. Defendant has insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 8 of Plaintiffs' Complaint, and therefore denies same.

9. Defendant has insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 9 of Plaintiffs' Complaint, and therefore denies same.

10. Defendant has insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 10 of Plaintiffs' Complaint, and therefore denies same.

11. Defendant has insufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 11 of Plaintiffs' Complaint, and therefore denies same.

12. Defendant denies the allegations contained in paragraph 12 of Plaintiffs' Complaint.

13. Defendant denies the allegations contained in paragraph 13 of Plaintiffs' Complaint.

14. Defendant denies the allegations contained in paragraph 14 of Plaintiffs' Complaint.

15. Defendant denies the allegations contained in paragraph 15 of Plaintiffs' Complaint.

AFFIRMATIVE DEFENSES

Answering further, and for its Affirmative Defenses, Defendant states as follows:

1. The subject matter of Plaintiffs' Complaint is barred by an accord and satisfaction between Plaintiffs and Defendant.

2. Plaintiffs' Complaint is barred by estoppel.

3. Plaintiffs' Complaint is barred by laches.

4. Plaintiffs' Complaint is barred by the statute of limitations.

5. Plaintiffs have previously waived any right they may have had to file their Complaint in this matter.

6. Plaintiffs' Complaint fails to state a claim against Defendant upon which relief can be granted.

7. Plaintiffs do not have standing to bring this Complaint against Defendant.

8. This Court lacks jurisdiction over the subject matter of Plaintiffs' Complaint.

WHEREFORE, Defendant prays that Plaintiffs' Complaint be dismissed in its entirety at Plaintiffs' costs, that Defendant be awarded its reasonable attorney's fees, and

that Defendant be awarded such other relief as to this Court may seem proper.

Respectfully submitted,

SUELTHAUS, KRUEGER, CUNNINGHAM, YATES & KAPLAN, P.C.

By /s/ David F. Yates

By /s/ W. Dudley McCarter
7711 Carondelet Ave., Suite 500
St. Louis, Missouri 63105
(314) 727-7676

Attorneys for Defendant
Schneider Moving & Storage Company

(Certificate of Service omitted in printing.)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 80-0535-C(B)

LORAN W. ROBBINS, et al.,
Plaintiffs,

vs.

SCHNEIDER MOVING & STORAGE COMPANY,
a Missouri corporation,
Defendant.

MOTION OF DEFENDANT TO DISMISS COMPLAINT

(Filed October 20, 1980)

COMES NOW the Defendant, pursuant to Rule 12 of the Federal Rules of Civil Procedure, and moves this Court for an order dismissing Plaintiff's (sic) Complaint on the following grounds:

1. This Court lacks jurisdiction over the subject matter.

2. Plaintiff's Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, Defendant prays for an Order of this Court dismissing Plaintiff's Complaint, and for such other and further Orders as the Court may deem proper.

Suelthaus, Krueger, Cunningham,
Yates & Kaplan, P.C.
/s/ David F. Yates, #20965
/s/ W. Dudley McCarter

7711 Carondelet Ave., Suite 500
St. Louis, Missouri 63105
(314) 727-7676
Attorneys for Defendant

(Certificate of Service omitted in printing)

State of Missouri)
County of St. Louis) ss.

AFFIDAVIT

COMES NOW Marvin Schneider, and upon his oath deposes and says:

1. I am the Vice President of Schneider Moving & Storage Company, the Defendant in Case No. 80-535C(B) (sic) now pending in the United States District Court for the Eastern District of Missouri, Eastern Division.

2. I have been involved in the commercial and residential moving business with Schneider Moving & Storage Company for approximately ten (10) years. My father, Frank F. Schneider, who is President of Schneider Mov-

ing & Storage Company, has been involved in the commercial and residential moving business in the metropolitan St. Louis area for 31 years.

3. During the entire time that I have been involved with Schneider Moving & Storage Company and in the moving industry, and on information and belief, for as long as my father has been involved with Schneider Moving & Storage Company and in the moving business, Schneider Moving & Storage Company has employed only two types of nonsupervisory employees—regular employees and extra employees. The extra employees are commonly referred to as "extras". It has always been the practice of Schneider Moving & Storage Company to regard certain employees as regular employees, entitled to seniority, holidays, vacations, and other benefits under the collective bargaining agreement with Teamsters Local No. 610. "Extras" were people who, from time to time, were employed as additional help, when needed and when they were available for work. When additional help was needed, the Company would seek "extras" from various sources, including the Union, recommendations from its regular employees, and recommendations from other movers in the moving industry. These "extras" did not have an obligation to accept employment with us and we did not feel that we had any authority or power over them to force them to work for us when we needed them.

4. The foregoing practice of using "extras" is, to the best of my knowledge, information, and belief, typical of the moving industry in the greater metropolitan St. Louis area.

5. On or about May 29, 1979, the Company voluntarily submitted to an audit of its payroll records by the

Central States Southeast and Southwest Areas Health and Welfare and Pension Funds. As a result of that audit the Company was billed for allegedly delinquent contributions to the Health and Welfare Fund in the amount of $12,303.50 and for allegedly delinquent contributions to the Pension Fund in the amount of $12,610.50. The largest part of the amounts alleged to be delinquent, were claimed to be due for employees employed as "extras" during the period March 28, 1976 through March 31, 1979. Additional amounts were claimed to be due and owing for two supervisors and a porter, all three of whom it is contended are outside of the scope of the bargaining unit covered by the collective bargaining agreement with Local 610.

6. Further affiant saith not.

I swear that the foregoing statement is true to the best of my knowledge and belief.

/s/ Marvin Schneider

Sworn and subscribed to before me this 17th day of October, 1980.

/s/ Rhonda G. McMaster
Notary Public

6-27-83

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Cause No. 80-0379-C(B)

LORAN W. ROBBINS (other plaintiffs' names omitted in printing),

Plaintiffs,

vs.

PROSSER'S MOVING AND STORAGE COMPANY,
a Missouri Corporation,

Defendant.

COMPLAINT

(Filed March 19, 1980)

Now come the Plaintiffs, by their attorneys, LaTourette and Weyerich, by Donald J. Weyerich and as and for a cause of action against the Defendant allege and show to the Court as follows:

I.

JURISDICTION

1. Jurisdiction of this Court is founded upon: Section 301 (a) of the Labor Management Relations Act of 1947, as amended, (29 USC Section 185 (a)); and Section 502 of the Employee Retirement Income Security Act of 1974 (29 USC 1132) in that the Plaintiffs are aggrieved by the Defendant's violation of the Collective Bargaining Agreements, Pension Plan and Pension Agreement and the Defendant's continued refusal to comply with certain terms of Collective Bargaining Agreements and Trust Plan and Trust Agreement of the Central States, Southeast and Southwest Areas Pension Fund and the Central States, Southeast and Southwest Areas Health and Welfare Fund thereby violating the provisions of the Employee Retirement Income Security Act of 1974, the terms and provisions of the employee benefit plans, Section 301 of the Labor Management Relations Act of 1947 and the Common Law of the State of Missouri.

II.

PARTIES

2. Plaintiffs Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley and R. V. Pulliam, hereinafter referred to as "The Trustees" are trustees of the Central States, Southeast and Southwest Areas Pension Fund, a common law pension trust established by trust agreement and an employee benefit plan, with its principal place of business in Chicago, Illinois, hereinafter referred to as "The Pension Fund"; and bring this action on behalf of the Trustees, their predecessors and/or successors, and the participants and beneficiaries of the Pension Fund, and the Pension Fund.

3. Plaintiffs Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley and R. V. Pulliam, hereinafter referred to as "The Trustees" are the trustees of the Central States, Southeast and Southwest Areas Health and Welfare Fund, a common law health and welfare trust, established by trust agreement and an employee benefit plan, with its principal place of business in Chicago, Illinois, hereinafter referred to as "The Health and Welfare Fund"; and bring this action on behalf of the Trustees, their predecessors and/or successors, and the participants and beneficiaries of the Health and Welfare Fund, and the Health and Welfare Fund.

4. Defendant Prosser's Moving and Storage Company, a Missouri corporation, is a citizen of the State of Missouri, a public mover, with its office and principal

place of business at 2718 Delmar Boulevard, St. Louis, Missouri, and is transacting business within the City of St. Louis, State of Missouri.

III.

NATURE OF CLAIMS

5. Defendant is an employer and a party in interest in an industry affecting commerce within the meaning of Section 3 (5), (11), (12) and (14) of the Employee Retirement Income Security Act of 1974 (29 USC 1002 (5) (11) (12) and (14)) and the Labor Management Relations Act of 1947 (29 USC 151 *et seq.*).

For all times relevant herein, Defendant was a party to and agreed to abide by the terms of Collective Bargaining Agreements between itself and Local Union No. 610, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America which is a labor organization that represents for the purpose of collective bargaining certain employees of Defendant and employees of other employers in industries affecting interstate commerce within the meaning of Sections 2 (5), 9 (a), and 301 (a) of the Labor Management Relations Act of 1947, as amended (29 USC 151 *et seq.*).

6. That on or about March 1, 1976, Defendant entered into a Master Agreement for Public Movers of the Greater Metropolitan St. Louis and St. Louis County areas of Missouri for the period March 1, 1976 through February 28, 1979 (See Exhibit 1) with Local Union No. 610, the significant portions of which are attached hereto, which Agreement provides for specific payments to the Health

and Welfare Fund and Pension Fund for each employee covered by said Agreement.

7. That on or about March 1, 1979, Defendant entered into a Master Agreement for Public Movers of the Greater Metropolitan St. Louis and St. Louis County Areas of Missouri for the period March 1, 1979 to February 28, 1982 (See Exhibit 2) with Local Union No. 610, the significant portions of which are attached hereto, which Agreement provides for specific payment to the Health and Welfare Fund and Pension Fund for each Employee covered by said Agreement.

8. As provided in the Collective Bargaining Agreements and Pension Trust Agreement (See Exhibit 3), Pension Plan (See Exhibit 4), Welfare Trust Agreement (See Exhibit 5), and Participation Agreement (See Exhibit 6), Plaintiffs, as Trustees aforesaid, are required to receive, hold and manage all monies required to be contributed to Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds in accordance with the provisions of the then applicable Collective Bargaining Agreements, as a Trust Fund, for the uses and purposes set forth in the Agreement and Pension Trust Agreement and Welfare Trust Agreements governing the Fund to which the contributions are made.

9. By virtue of provisions contained in the Collective Bargaining Agreements to which Defendant is bound, Defendant did promise and become obligated to make contributions, in amounts set forth therein, to said Pension and Health and Welfare Funds on behalf of its employees for each hour worked or for which wages were received by such employees.

Defendant agreed that all amounts required to be paid into the said Pension and Health and Welfare Funds, as above set forth, shall be paid not later than the 15th day of the month next succeeding the month in which an employee covered by the collective bargaining agreement worked or received wages.

Defendant further agreed to furnish to the Trustees of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds in each month, not later than the 15th day of the month next succeeding, a monthly contribution report, setting forth therein:

(a) the names and social security numbers of employees

(b) hours for which wages were received by the employee

(c) contributions required to be made on behalf of each employee

or in such cases where no employee worked or received wages, a statement to that effect and indicating no contributions were required to be made for such period.

Each Employer bound by the collective bargaining agreement has agreed that a failure by an Employer to make payment of contributions required to be made thereunder shall constitute a violation of said agreement by such Employer.

10. Pursuant to provisions contained in the Collective Bargaining Agreements and Health and Welfare and Pension Trust Agreements, the Trustees acting thereunder are authorized and empowered to examine and copy the payroll books and records of an Employer to permit such Trustees to determine whether an Employer is mak-

ing full payment as required under the applicable Collective Bargaining Agreement.

It is further provided therein, that in the event upon an audit made by the Trustees and/or upon other evidence it shall be found that an Employer has failed to make all contributions required on such Employer's part to be made, Trustees shall impose the following upon such delinquent Employer:

(a) all costs of such audit shall be paid by such Employer

(b) all costs, expenses, interest on monies due at the rate of nine percent (9%) per annum, and attorney's fees incurred by the Trustees

11. Notwithstanding the foregoing, Defendant has violated the obligations on Defendant's part undertaken, in that the Defendant has failed:

To allow the Trustees to make "proper" audit of Defendant's payroll books and records to determine amounts due to Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund

To furnish to the Trustees of Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund the required monthly statement as required by the collective bargaining agreement.

In addition to the foregoing, Defendant has repeatedly failed to make contribution reports and the required payments thereon upon their respective due dates.

12. By the above described omissions and breaches of Agreement by the Defendant:

The Trustees of the Central States, Southeast and Southwest Areas Pension Trust Fund may be required to deny the employee-beneficiaries of such fund, for whom required contributions have not been made, the benefits provided thereunder, thereby causing to such employee-beneficiary substantial and irreparable damage and injury.

The Trustees of the Central States, Southeast and Southwest Areas Health and Welfare Fund will be required to provide to employees of Defendant benefits provided thereunder notwithstanding the failure of Defendant to make required contributions thereto, thereby reducing the corpus of such Fund and endangering the rights of employee-beneficiaries thereunder on whose behalf contributions are being made, all to their substantial and irreparable injury.

13. Plaintiffs, in their behalf and on behalf of all employees for whose benefit the Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund have been established, have requested Defendant to perform its obligations, but Defendant has refused and failed to perform as herein alleged.

14. Plaintiffs are without an adequate remedy at law and will suffer immediate, continuing and irreparable injury, loss and damage unless Defendant is ordered to specifically perform all obligations on Defendant's part required to be performed under the Collective Bargaining Agreement, Pension Agreement, Health and Welfare Trust Agreement, and Participation Agreement, and is restrained from continuing to refuse to perform as thereunder required.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand the following relief:

1. That an account be taken as to all employees of Defendant covered by the Collective Bargaining Agreement, as to wages received and hours worked by such employees to determine amounts required to be paid to the Trustees of the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds, covering the periods for which the collective bargaining agreements are effective.

2. That Defendant be decreed to pay to the Trustees of the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds all sums determined to be due, together with interest on all monies due at the rate of nine percent (9%) per annum.

3. That Defendant be specifically required to perform and continue to perform all obligations on Defendant's part undertaken, particularly to furnish to the Trustees of Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds the required monthly contribution report heretofore referred to, or in lieu thereof, a statement covering the period for which said report is required that Defendant had no employees for whom contributions are required to be made.

4. That Defendant be decreed to pay all costs attendant to any audit of Defendant's payroll books and records.

4. That Defendant be decreed to pay all costs attendant to any audit of Defendant's payroll books and records. (sic)

5. That Defendant be decreed to pay to the Trustees their reasonable attorney's fees all as in the Health and Welfare and Pension Trust Agreements.

6. Plaintiffs have such other and further relief as by the Court may be deemed just and equitable, all at Defendant's costs.

LaTOURETTE AND WEYERICH
By /s/ Donald J. Weyerich #20191
Attorney for Plaintiffs
11 South Meramec - Suite 1400
Clayton, Missouri 63105
(314) 727-0777

(Exhibits omitted in printing, except Exhibit 2, printed below.)

EXHIBIT 2

MASTER AGREEMENT

FOR

PUBLIC MOVERS OF THE
GREATER METROPOLITAN ST. LOUIS AND
ST. LOUIS COUNTY AREAS OF MISSOURI

March 1, 1979

TO

February 28, 1982

Miscellaneous Drivers and Helpers Union, Local 610

Affiliated with the International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America

(Received C. S. Contract Dept., May 31, 1979)

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AGREEMENT

This Agreement, effective March 1st 1979, by and between Prosser Moving & Storage Co., or its successors, located in the Greater Metropolitan St. Louis and St. Louis County of Missouri, hereinafter called the "Company" party of the first part, and Miscellaneous Drivers and Helpers Local No. 610, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or its successors, party of the second part, hereinafter called the "Union", for the purpose of establishing rates of pay, wages, hours of work, and conditions or (sic) employment to be observed between the parties hereto.

ARTICLE I—A RECOGNITION

The Company agrees to recognize, and does hereby recognize, the Union, its agents, representatives or successors as the exclusive bargaining agency for all of the truck drivers, warehousemen, helpers and packers.

The Company will neither negotiate nor make collective bargaining agreements for any of its employees in the bargaining unit covered hereby unless it be through duly authorized representatives of the Union.

The Company agrees that it will not interfere with, restrain, coerce or discriminate against any of its employees in connection with their membership in the Union.

ARTICLE I—B JURISDICTION

Section 1 Employees shall perform the following assignments:

(Page 2) All local moving of residential and commercial packaging and furnishings.

All warehouse work, packing and unpacking, crating and uncrating, deliveries and pickups of materials and equipment.

Work as helpers for loading and unloading of all local and long-distance trucks, when such work is performed in the commercial zone or a seventy-five (75) mile radius of St. Louis, Missouri and the Company is the originating or destination agent.

Work as drivers of long-distance trucks when such equipment is owned, leased as leasee, assigned to and operated by this Company.

Section 2. The Employer will not direct or require persons outside the bargaining unit here involved to perform work which is recognized as the work of the employees in said bargaining unit.

Section 3. The intent of this Article is not to add to or delete from the jurisdiction of the Union. The Company shall not construe to circumvent recognition of jurisdiction of this Local Union.

ARTICLE II UNION SECURITY

Section 1. It is understood and agreed by and between the parties hereto that as a condition of continued employment all persons who are hereafter employed by the Employer in the unit which is the subject of this Agreement shall become members of the Union not later than the thirty-first day following the beginning of their employment or the execution date of this Agreement, whichever is the later; that the continued employment by the Employer in said unit of persons who are already mem-

bers in good standing of the Union shall be conditioned upon those persons continuing their payment of the periodic dues of the Union; and that the continued employment of persons who were in the employ of the Employer prior to the date of this Agreement and who are not now members of the Union shall be conditioned upon those persons becoming members of the (Page 3) Union not later than the thirty-first day following the execution date of this Agreement. The failure of any person to become a member of the Union at such required time shall obligate the Employer upon written notice from the Union to such effect and to the further effect that union membership was available to such person on the same terms and conditions generally available to other members to forthwith discharge such person. Further, the failure of any person to maintain his union membership in good standing as required herein shall, upon written notice to the Employer by the Union to such effect, obligate the Employer to discharge such person.

Section 2. The parties hereto also recognize the fact that the Union's Hiring Hall may be of assistance in supplying casual employees, to meet the Company's need for additional employees on a daily basis. It is therefore agreed that the Company shall notify the Union office whenever such additional employees are needed, and afford the Union a reasonable opportunity to supply extra employees to fill such needs as the need for extra employees may arise.

Section 3. If any Article or Section of this Agreement or any amendment thereto should be held invalid by operation of law or by any tribunal of competent jur-

isdiction, or if compliance with or enforcement of any Article or Section should be restrained by such tribunal pending a final determination as to its validity, the remainder of this Agreement or amendments thereto or the application of such Article or Section to persons or circumstances other than those as to which it has been held invalid or as to which compliance with or enforcement of has been restrained shall not be affected thereby.

Section 4. In the event that any Article or Section is held invalid (Page 4) or enforcement of or compliance with which has been restrained, as above set forth, the parties affected thereby shall enter into immediate collective bargaining negotiations for the purpose of arriving at a mutually satisfactory agreement regarding such Article or Section. If the parties do not reach agreement, the issue shall be referred to arbitration, as hereinafter provided, except that if any Section of the Union Security Clause should be declared invalid the parties shall not be bound to arbitrate such issue.

ARTICLE III CHECK-OFF OF DUES AND INITIATION FEES

It is understood and agreed between the Employer and the Union that the Employer will deduct any back unpaid union dues and initiation fees owed the Union (provided such indebtedness for dues or initiation fees was incurred during employment with the Employer) as well as current monthly union dues and initiation fees, from the paychecks of all Employees who have signed proper legal authorization for such deductions and who are covered by this Agreement, on the last pay day of the month

preceding the current month for which current dues and initiation fees are due the Union. The Employer further agrees to remit to the Secretary-Treasurer of the Union, immediately after the check-off payday, all union dues and initiation fees so deducted from the paychecks of Employees covered by this Agreement. The Secretary-Treasurer will promptly issue a receipt to the Employer for all such dues and initiation fees so received by him.

ARTICLE IV REPRESENTATION

Section 1. The Union shall be represented by Shop Stewards, to be selected in any manner determined by the *Union*. The names of the Shop Stewards shall be certified in writing by the Union to the Employer within ten (10) days after their election. The Shop Stewards may meet with the Employer as often as necessary to consider grievances.

Section 2. An authorized representative of the Union shall have access at all times during working hours to the Employer's premises and work sites (Page 5) for the purpose of enforcing this Contract Agreement or to confer with Unit officers of the Industry, Shop Stewards and the Employer's officials.

ARTICLE V GRIEVANCE PROCEDURE

Should differences arise between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of this agreement, such differences shall be settled in the following manner:

Section 1. The aggrieved employees or employee shall first take the matter up with the shop steward who in turn

will take the grievance up with the foreman in charge of the department within three (3) working days after knowledge of the alleged violation. The employees shall have the right to have the shop steward present on any grievance.

Section 2. If no satisfactory adjustment is agreed upon within one (1) working day, the matter shall be referred in writing within five (5) working days by the steward and/or union to the general manager of the company involved, or some other executive officer of the Company with authority to act, who shall review the alleged grievance and offer a decision within five (5) working days after receipt of the same.

Section 3. If no agreement has been reached pursuant to the procedure specified in Sections 1 and 2, either party reserves the right to request arbitration of the dispute. If arbitration is requested by either the Company or the Union within thirty days following the decision of the General Manager, the Company and the Union agree to submit the grievance to an arbitration board as provided for in this Agreement, except that the Union reserves the right to use its economic power in support of its demands if the violation involves the failure by the Employer to pay the established hourly rates of pay, failure to make the required contributions into the Health & Welfare, Pension or Prescripticare Plans. The Union may not initiate strike action after agreeing to proceed to arbitration.

(Page 6) Section 4. If the grievance is submitted to arbitration, the Company and the Union agree to accept, as final and binding on all parties, the decision of the ma-

jority of an arbitration board consisting of one (1) member selected by the Company and one (1) member selected by the Union and the third selected by the two arbitrators nominated above. It shall be incumbent upon both parties to nominate the third arbitrator within seven (7) days after such notice is given. Upon the failure of the two arbitrators nominated as above to agree upon the third arbitrator, both parties agree to ask the U. S. Mediation and Conciliation Service to nominate nine (9) persons for such third arbitrator from whom the parties will select one by each side alternately striking from the list, one name, commencing with the party seeking arbitration and the last name remaining on such list will be deemed chosen as the third arbitrator. The expense of the arbitrator selected by the Company shall be borne by the Company. The expense of the arbitrator selected by the Union shall be borne by the Union. The expense of the third arbitrator selected or appointed shall be borne equally by the Company and the Union.

ARTICLE VI SENIORITY

Section 1. In all cases of decreasing the working force the only factor to be considered will be the length of continuous service with the Company.

Section 2. It is understood that seniority shall be Company wide within the bargaining unit.

Section 3. The list of employees according to seniority is attached hereto and made a part of this Agreement. The Company agrees to supply the Union office with a list of all additions and/or deletions to the seniority list each March and September.

Section 4. The Company has the right to assign work on a day-to-day basis so (sic) in accordance with seniority providing the senior employees have the greater opportunity of employment.

(Page 7) Section 5. Seniority as defined above shall be broken and employment terminated by:

A. Discharge.

B. Resignation.

C. Absence due to layoff for a period of more than twenty-four (24) months from the date of layoff provided that in cases of proven sickness, he shall be continued on the seniority list until he is able to return to work.

D. Overstaying a leave of absence.

Section 6. *Layoffs.* An employee shall be continued on the seniority list of the Company for a period of twenty-four (24) months from the date of his layoff. Employees failing to report for work from a layoff within five (5) working days after being notified by registered mail shall have his employment terminated.

Section 7. *Union Activity.* Any employee elected or appointed as an official of the Union or delegate to any labor activity, necessitating a leave-of-absence shall be granted a leave of absence without pay or other benefits and be guaranteed reemployment at the end of such period with the same seniority as though he had been continuously employed, provided at least one (1) week's advance notice is given prior to leave of absence and upon return from said leave of absence.

Under no circumstances will this clause be construed as to prevent employees from serving as a witness or on negotiating committees from time-to-time.

Section 8. *Military Activity.* Regular employees who leave the service of the Company to enter that of the United States Armed Forces, or the service of the U. S. Maritime Commission or who are drafted by the United States Government for civilian service will upon their return within ninety (90) days from release from such service, be granted all seniority rights as if continuously employed by the Company during such service. Such persons will be rehired by the Company to take the place of other persons employed by the Company.

Section 9. *Day's Off* (sic). Employees called in to work on their days off, (Page 8) Sundays or Holidays, shall be called in by seniority and qualification.

Section 10. *Bidding.* Warehouse openings shall be posted and open for bid for a period of five (5) working days. The Company will fill such openings with the senior employee who signs the bid sheet to indicate that he desires said job, who may be qualified to perform the work in question.

The senior bidder shall be given a reasonable trial period of thirty (30) days to qualify and once qualified must remain on that job for the bid period.

Bids will not go into effect until its known that all employees had equal opportunity to bid.

Section 11. *Probationary Employee.* A new probationary employee shall work under the provisions of this Agreement but shall be employed on a ninety (90) calen-

dar day trial basis. During which period he may be discharged without further recourse; provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discrimination against Union members.

A new employee must work thirty (30) cumulative work days within the probationary period and upon completion thereof, shall be considered a regular employee and placed on the seniority list. Such employees seniority date for all purposes shall be established as of the first day worked in such probationary period in which he meets the requirements aforementioned.

Any day worked, regardless, if the employee was or was not used as a replacement, shall be counted in determining whether or not the employee qualifies under the above provisions.

It is further mutually understood that any rehire of the probationary employee (after the ninety (90) day period) shall qualify the employee in accordance with these provisions.

A new employee can gain seniority by qualifying under the above provisions only. This provision shall not be used to defeat the purpose of (Page 9) hiring regular employees.

Section 12. *Hiring Hall Casual.* When the Employer needs casual employees, the Local Union shall be given equal opportunity with all other sources to provide suitable applicants. However, the Employer shall not be required to hire those referred by the Union.

It is further mutually understood that any casual employee who has established thirty (30) days' worked within the Moving Industry and then works a total of thirty (30) cumulative work days for the same Company within any ninety (90) calendar day period shall also accrue seniority under the provisions of this Article and in such instance his or her seniority date for all purposes shall be thirty (30) work days back from the day he or she worked the thirtieth (30th) day.

Only the day's (sic) worked because of additional work, shall be counted in determining whether or not he or she has qualified under the above provision. A casual employee can gain seniority be (sic) qualifying under the above provisions only. This provision shall not be used to defeat the purpose of hiring regular employees.

Section 13. *Seasonal Employee.* A seasonal employee is one, such as a student, who is hired for a seasonal period between May 15th and September 15th. With respect to seniority provisions herein a seasonal employee shall not gain seniority but shall comply with the provisions of Article II. The Employer may use one seasonal employee for every ten regular moving industry men used on any given day, except on commercial moves, when all other regular industry men shall be offered work before seasonal employees.

ARTICLE VII SUSPENSION OR DISCHARGE

Section 1. The Employer shall not discharge nor suspend any employee without just cause. The Employer shall practice progressive discipline. Progressive disci-

pline for related acts shall "generally" be defined as (Page 10) being:

a) Documented verbal warning

b) Two (2) written warning letters

c) Disciplinary suspension or discharge

However, progressive discipline need not apply to acts of dishonesty, drunkenness, use of intoxicating liquors or illegal drugs while on duty, willfull destruction of property, or gross insubordination. Warnings verbal and written must be sent by certified mail to the employees last known address, the Local Union and the Shop Steward affected. Warning letters will not remain in effect for this purpose beyond a period of six (6) months, and said letters shall not be used as a basis for further disciplinary action.

Section 2. The Employer shall not discharge nor suspend any employee without just cause. Any employee before discharge, will have an opportunity to present any facts or other information he wishes the Company to consider. Where possible, the information should be submitted in writing. The Company will follow the general principles of progressive discipline before discharge except in cases of serious misconduct as outlined above.

Section 3. Discharge must be by written notice sent by certified mail to the employee to his last known address, the Local Union and Shop Steward affected. Any employee may request an investigation as to his discharge or suspension. Should such investigation prove that an injustice has been done an employee, he shall be reinstated with full, partial, or no compensation for time lost. Appeal from discharge, suspension or warning letters must be made within ten (10) days by written notice.

ARTICLE VIII A. WAGES

Section 1. All regular employees shall be paid weekly on the pay day established by past practice. All Employees shall receive an itemized statement of earnings and deductions. All extra employees shall be paid upon completion of their tour of duty. Any change in the established pay day shall be negotiated between the Employer and the Union.

(Page 11) Section 2. The straight time hourly rates of pay for employees shall be:

LOCAL WORK	Effective 3-1-79	Effective 9-1-79	Effective 3-1-80
Driver	$6.75	$6.95	$7.25
1st shift Warehousemen	$6.75	$6.95	$7.25
2nd shift Warehousemen	$7.45	$7.65	$7.95
Packer	$6.75	$6.95	$7.25
Helper	$6.45	$6.65	$6.95

	Effective 9-1-80	Effective 3-1-81	Effective 9-1-81
Driver	$7.35	$7.65	$7.75
1st shift Warehousemen	$7.35	$7.65	$7.75
2nd shift Warehousemen	$8.05	$8.35	$8.45
Packer	$7.35	$7.65	$7.75
Helper	$7.05	$7.35	$7.45

Section 3. A probationary employee without previous experience in the Moving Industry in St. Louis may be hired at the rate of 80¢ per hour less than the scale for the classification of work for which hired, provided that his hourly rate is adjusted automatically 10¢ an hour upon the completion of every thirty (30) calendar days of employment until the classification rate of this Section is attained.

An employee with work experience when referred by the Union, shall be paid at the rate stated for his classification.

Section 4. A seasonal employee may be hired during the seasonal period of May 15th through September 15th; and shall be paid less than the helper's rate as follows:

1st year—$1.50 per hour less than the helpers current rate
2nd year—$1.00 per hour less than the helpers current rate
3rd year—$ .50 per hour less than the helpers current rate
4th year—shall be paid the same rate

When a seasonal employee is required to drive, pack, or perform warehouse work, said employee shall receive the rate of pay specified for that classification.

Section 5. The straight time hourly rates of pay for employees shall be: (Page 12)

LONG DISTANCE WORK	Effective 3-1-79	Effective 9-1-79	Effective 3-1-80
Driver	$6.75	$6.95	$7.25
Helper	$6.45	$6.65	$6.95

	Effective 9-1-80	Effective 3-1-81	Effective 9-1-81
Driver	$7.35	$7.65	$7.75
Helper	$7.05	$7.35	$7.45

Long Distance Driving Time—35 miles driven equals one (1) hour's pay at straight time the hourly rate.

Section 6. *Deadheaded time* shall be paid at thirty-five (35) miles driven equals one hour's pay at straight-time the hourly rate.

Section 7. *Layover time* caused by breakdowns of equipment, impassable roads, or waiting for return loads shall be paid at the straight time rate of pay up to and

including ten (10) hours for a twenty-four (24) hour period.

Section 8. *Long Distance Loading and Unloading* shall be paid at time and one-half (1-½) the straight time hourly rate, except where the time is on a Sunday or Holiday it shall be paid for at double the straight time hourly rate of pay, provided, it has been previously authorized and paid in full by Customer.

Section 9. *Long Distance Employee* re: Holiday Pay —Employee shall receive eight (8) hours' Holiday Pay as provided for in Article XIV in addition to compensation received for mileage and hourly work performed during the Holiday week. Upon returning said employee can take a day off without pay.

ARTICLE VIII B. LONG DISTANCE ALLOWANCES

Section 1. Straight time the long distance rate plus a daily travel allowance shall be paid to all employees who have been away from their home terminal for period of fifteen (15) hours or more in any twenty-four (24) hour period, provided the employee involved has accompanied the long distance truck.

(Page 13)

Allowance as follows:	Effective 3-1-79	Effective 3-1-80	Effective 3-1-81
	$22.00	$23.30	$25.00

Section 2. A daily travel allowance shall be paid to all employees who leave and return to their home terminal and have not been away fifteen (15) hours in any twenty-four (24) hour period, provided the employee involved has accompanied the long distance truck.

Allowance as follows:	Effective 3-1-79	Effective 3-1-80	Effective 3-1-81
	$7.00	$9.00	$10.00

ARTICLE VIII C. INCENTIVE PROGRAM

The Company or the Union may request to negotiate an addendum to this contract agreement RE: a possible incentive program for long distance work, however, once the program is initiated it shall remain in effect for the remainder of this contract agreement.

Section 1. The intent of the percentage program is not to decrease the work force when there is additional volume of business.

Section 2. *Safe-guard guarantee:* the employee shall be guaranteed the earnings received under this Incentive Program shall not be less than earnings he would have recived (sic) if he had been compensated in accordance with regular long distance provisions provided for in Article VIII A. Wages and B. Allowances.

When earnings are less the Company shall be obligated to pay whichever amount is greater in monies (sic).

ARTICLE IX HOURS OF WORK

Section 1. The normal work week shall be Monday through Friday. Starting time shall be 8:00 A.M. and finished at 4:30 P.M.

Section 2. The lunch period shall be at least a thirty (30) minute period or up to a maximum of a sixty (60) minute period as determined by the employer and employees of the Company, in which case the regular work day (Page 14) would end at 5:00 P. M. but not later.

Section 3. The Employer may change the established starting time with one week's notice, provided the starting time is not earlier than 7:00 A.M. or later than 8:30 A.M. and the end of the shift is not later than 5:00 P.M.

Section 4. Any employee who is required to work prior to the established starting time shall be paid time and one half (1-½) the prevailing rate of pay.

Section 5. Nothing contained in this Article shall be considered as any guarantee of hours or pay except that any employee who reports for work as scheduled will receive at least five (5) hours' pay at the prevailing rate of pay.

Section 6. All time worked in excess of eight (8) hours per day and all work in excess of forty (40) hours per week shall be paid at the rate of time and one-half (1-½) the employees straight time hourly rate for work performed during such overtime periods.

Section 7. All time worked on Saturdays shall be paid at the rate of time and one-half (1-½) the employees straight time hourly rate of pay.

Section 8. All work performed on Sundays or Holidays shall be paid at the rate of double the employees straight time hourly rate of pay.

Section 9. The warehouse second shift when practiced shall be established to start between 4:30 P.M. and 6:00 P.M. and finish between 1:00 A.M. and 2:00 A.M., the shift can not be established to overlap the first shift.

ARTICLE X WORK PRACTICE

It is understood and agreed that all employees shall do their best to further the interest of the Company.

(Page 15) Section 1. *Computing Time Worked:* The Company shall furnish time clocks or some other method of indicating time in and time out as is feasible or appropriate under the circumstances. In figuring the time worked by an employee, the Company shall credit him with time worked in the service of, and at the direction of, the Company. In figuring the time worked by an employee, the Company shall credit him with time worked from the moment that he leaves the garage until he returns to the garage, except when he is expected or instructed to report for work at a particular hour, in which event he shall be credited with time worked from the moment he reports; provided, however, that such employee in this unit covered by this agreement shall be compensated at a rate of pay stated herein and applicable to the work actually being performed at the time by such employee. This rate shall be paid to him for all hours in which he is so working. In the event of commercial moving, the Company shall credit him with time worked from the time he is instructed to report to the place, or begins to work, to the time he completes such work. It is mutually agreed between the parties to this contract that men assigned to a move shall be provided company transportation, by the Company, to their personal transportation if left at point of origin of move, or at company premises, or, if asked to report to a specific location they shall be reimbursed for out-of-pocket expense on parking.

Section 2. Whenever an employee classified as a helper works as a driver, packer, or warehouseman, he shall be compensated at the driver's, packer's or warehouseman's rate for all hours he is so working. An employee who works six (6) calendar months or more in a

calendar year in a higher classification shall be paid the rate for such classification for all hours he works thereafter.

Section 3. Seniority can not be used to displace a junior employee's original assignments for the remainder of a given day.

(Page 16) Section 4. Drivers of two separate vehicles shall not be permitted to assist each other on loading and unloading of long distance trucks.

Section 5. A registered two man operation shall be permitted to assist each other on a single job.

Section 6. *Warehouse:* If a Company does not practice the following clauses, then choice by seniority shall be the only factor used to determine who works in the warehouse on any given shift.

A. The Company shall provide one (1) full time Head-warehouseman on the first shift with a forty (40) hour guarantee Monday through Friday. This job will be posted yearly and claimed by seniority.

B. The Company may provide two (2) warehousemen on the second shift with a forty (40) hour guarantee Monday through Friday. These jobs will be posted prior to each six month period, April 1st through September 30th and October 1st through March 31st. Where practiced there shall be two (2) warehousemen to perform warehouse and normal maintenance work on the second shift.

C. The intent of the above clauses is not to restrict or limit the amount of warehouse jobs a company can post, however, when posted they shall comply as provided,

with the guarantees spelled out for the number of warehousemen aforementioned and not for the employees over those specified numbers.

D. An Employee classified as a warehouseman by Bid, but has no guarantees shall have choice by seniority on the days additional warehousemen are needed. However, if a choice can not be given the Company can assign the Junior Warehouseman to perform warehouse work.

Section 7. *Notification:* Employees scheduled to work should notify the Company of their inability to work as scheduled at least thirty (30) minutes prior to their scheduled starting time.

(Page 17) When thirty (30) minutes notice is not given the Company can fill the vacancy without revising the daily assigned schedule.

Section 8. *Commercial Work:* In cases where additional men are needed for commercial work, the following rule for working will apply:

a) Company's roster men
b) Hiring Hall casuals
c) Roster men from other companies
d) Seasonal employees

Section 9. *Union Helpers for owner-operators:* The Company and Union will assist in dispatching its employees and members for helping drivers load and unload long distance trucks. There will be no further obligation to the employee and union member in regard to collecting wages or workmen's compensation claims. However, the Union emphasizes the wages to be as follows:

	Effective 3-1-79	Effective 9-1-79	Effective 3-1-80
Driver	$6.75	$6.95	$7.25
Packer	$6.75	$6.95	$7.25
Helper	$6.45	$6.65	$6.95

	Effective 9-1-80	Effective 3-1-81	Effective 9-1-81
Driver	$7.35	$7.65	$7.75
Packer	$7.35	$7.65	$7.75
Helper	$7.05	$7.35	$7.45

A) Plus a three dollar ($3.00) daily allowance, five (5) hours' minimum pay, time and one-half (1-1/2) for after hours and Saturday work, and double time on Sundays and Holidays.

B) Members who charge more or less than the rates outlined in this contract could be subject to charges of this Union.

C) Union movers must carry a monthly dues receipt showing the month paid through. If a receipt cannot be shown and if not current within one (1) month, he may not be given the opportunity to work.

(Page 18) ARTICLE XI UNAUTHORIZED ACTIVITY

Section 1. It is understood and agreed that the Union shall have no financial liability for acts of its members or agents which are unauthorized and which the Union cannot control. It is agreed, however, that in the event of any unauthorized action, the Union shall, upon receiving notice thereof, urge its members to return to work, if there should be a work stoppage, and just as

soon as practical address a letter to the Company notifying the Company that the action of the Union members or agents is unauthorized.

Section 2. The Company shall be privileged to discipline employees responsible for such unauthorized activities without violation of the terms of this Agreement, subject however, to the grievance and arbitration provisions of this Agreement.

Section 3. In order that the Company may be apprised of an official of the Union empowered to authorize strikes, work stoppages, or actions which will interfere with the activities required of employees under this Agreement, it is understood and agreed that only the assigned Union Representative through authorization of the Executive Board has the power or authority to authorize any such actions or give the orders or directions necessary to carry out any such action.

ARTICLE XII PROTECTION OF RIGHTS

It shall not be a violation of this Agreement for the Employees covered hereunder to refuse to cross a picket line and perform work in any instance where the picket line has been either established and authorized or sanctioned and recognized by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

ARTICLE XIII MANAGEMENT RIGHTS

Section 1. It shall be the right of the Company to manage and (Page 19) direct its business. The right to hire, discipline, discharge, promote, lay-off, assign equip-

ment and work assignments, subject however, to the terms and provisions of this Agreement (sic).

Section 2. With due respect to the Company's usual rights to generally exercise its authority spelled out in this Article, the Company acknowledges its duty to use best judgment in providing senior employees the greater opportunities of employment.

ARTICLE XIV VACATIONS

Section 1. Any employee employed for one (1) year by the same Company shall be entitled to a one-week vacation with pay. Any employee employed for three (3) consecutive years by the same Company shall be entitled to a two (2) week vacation with pay. Employees employed for seven (7) consecutive years by the same Company shall be entitled to three (3) weeks vacation with pay. An employee employed for thirteen (13) consecutive years by the same Company shall be entitled to four (4) weeks' vacation with pay.

Effective March 1, 1981, Employees employed for thirty (30) consecutive years by the same Company shall be entitled to five (5) weeks' vacation. However, no employees shall receive a paid vacation unless he has worked a total of 1200 hours for one Company in the year immediately preceding the date of his eligibility for such vacation. Time lost due to sickness or accident shall be considered as time worked toward 1200 hour qualification.

Employees who leave the service of the Company, after completing one (1) full year of service shall receive a pro-rata vacation on the basis of one-twelfth (1/12) of his earned vacation for each month of completed service after his anniversary date.

For the purpose of this Article a week's pay shall be an amount equal to forty-five (45) times the hourly rate for his permanent classification (Page 20) of work.

Section 2. Vacations shall be given according to seniority, and cover the entire year giving due regard to employee anniversary date and his expressed desire and to the needs of the Company's business.

Section 3. While on a paid vacation, an employee shall not perform work for the Company or for any other Company covered by this Agreement.

Section 4. Vacation pay shall be paid on the last pay day prior to the beginning of the vacation period.

Section 5. Vacation schedules for employees shall be posted in a conspicuous place at least sixty (60) days prior to the scheduled dates.

Section 6. If a holiday falls during an employee's vacation he shall be given an additional day of vacation with pay.

Section 7. An employee who withholds selection of his vacation schedule beyond the date set by the Company shall be given the last choice to select his vacation.

Section 8. An employee who chooses to split his vacation shall, upon selection of his first choice of time off, wait until all other employees in the Company who are eligible have exercised their choices of vacation dates.

ARTICLE XIV HOLIDAYS

Section 1. A regular employee who has been on seniority of this Company for one hundred and eighty (180) days or more shall receive eight (8) hours' pay

at the hourly rate for his classification for the following holidays not worked:

New Years Day	Veteran's Day
Memorial Day	Thanksgiving Day
4th of July	Christmas Eve
Labor Day	Christmas Day

Section 2. Two (2) additional floating holidays shall be granted each calendar year in addition to the above listed holidays, provided (Page 21) however, the employee has been on seniority of this Company for one (1) anniversary year of employment. Said holidays shall be taken any time during the year, provided one (1) week's notice is given by the employee.

Section 3. Further qualifying holidays: Such employee shall have worked for the Company on his last scheduled workday before and his first scheduled workday after said Holiday. No employee shall forfeit his holiday pay if he has been available for scheduled work but was unable to do so because of accident or illness as proven by competent medical testimony; funeral leave; or because of such absence which has been approved by the Company for an urgent, necessary and compelling personal reason prior to the scheduled starting time of the day involved.

If an employee is on layoff status at the time the given Holiday occurs and he has worked for his employer within two (2) weeks before or within two (2) weeks after said Holiday.

ARTICLE XV HEALTH AND WELFARE BENEFITS

Section 1. Effective March 1, 1979, the Employer shall contribute to the Central States, Southeast and Southwest Areas Health and Welfare Fund, which is to be administered jointly by the parties thereto, the weekly sum specified in the following schedule for each Employee covered by this Agreement who has been on the payroll Ninety (90) days or more; Effective March 1, 1979, $29.50 per week, Effective March 1, 1980, $32.00 per week, Effective March 1, 1981, $34.50 per week. These amounts are required by the Central States, Southeast and Southwest Areas Health and Welfare Fund to maintain the highest Health and Welfare Program.

Section 2. The Employer presently making payments to the Central States, Southeast and Southwest Areas Health and Welfare Fund, and the Employers who may subsequently begin to make payments to such fund shall continue to make such payments for the life of this Agreement.

Section 3. By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties to the Health and Welfare Fund referred to in Section 1, to enter into appropriate trust agreements necessary for the administration of such fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such trustees within the scope of their authority.

Section 4. If an employee is absent because of illness or off-the-job injury and notifies the Employer of such

absence, the Employer shall continue to make the required contributions for a period of eight (8) weeks. If an Employee is injured on the job, the Employer shall continue to pay the required contributions until such Employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months. If an Employee is granted a leave-of-absence, the Employer shall collect from said Employee, prior to the leave-of-absence being effective, sufficient monies to pay the required contributions into the Health and Welfare Fund during the period of absence.

Section 5. Contributions to the Health and Welfare Fund must be made for each week on each regular Employee, even though such employee may work only part-time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other Health and Welfare Fund.

Section 6. Employees who work either temporarily or in cases of emergency under the terms of this contract shall not be covered by the provisions of this Article.

The Company further agrees to provide weekly disability each week in an amount not to exceed $125.00 a week when combined with Workmen's Compensation for those weeks up to twenty-six (26) in which the employee (Page 23) has been found by the Workman's Compensation Commission to be eligible for compensation under the law.

ARTICLE XVI PENSIONS

Section 1. The Employer shall contribute to a pension fund, referred to in Sections 2 to 5, of this Article

XVI, the weekly sum specified in the following schedule for each Employee covered by this Agreement who has been on the payroll one hundred and eighty (180) days or more; Effective March 1, 1979, $31.00 per week, Effective March 1, 1980, $37.00 per week, Effective March 1, 1981, $41.00 per week. These amounts are required by the Central States, Southeast and Southwest Areas Pension Fund to maintain the highest Pension Program.

Section 2. This Fund shall be the Central States, Southeast and Southwest Areas Pension Fund. There shall be no other pension fund under this contract for operations under this contract or for operations under the Southwest and Southeast Areas contracts to which Employers who are party to this Contract are also parties.

Section 3. By execution of this Agreement, the Employer authorizes the Employers' Associations which are parties hereto to enter into appropriate trust agreements necessary for the administration of such fund, and to designate the Employer Trustees under such Agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority.

Section 4. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months. If an employee is granted a leave-of-absence, the Employer shall collect from said employee prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Pension Fund during the period of absence.

(Page 24) Section 5. Contributions to the Pension Fund must be made for each week on each regular employee even though such employee may work only part-time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this Contract, and although contributions may be made to the Pension Fund.

Section 6. Employees who work part-time, temporarily, or in cases of emergency, under the terms of this contract, shall not be covered by the provisions of this Article; and provided further, the Employer shall not be obligated to pay on any employee who does not perform twenty-five (25) hours of work in any week. However, the employer agrees to make contributions for each regular employee on the basis of a minimum of forty (40) weeks in any year.

ARTICLE XVII PRESCRIPTICARE

Section 1. The Employes (sic) shall contribute to the Teamsters Local 610 Prescripticare Trust Fund (or to a designated insurance agency), which is to be administered jointly by the parties thereto, the monthly sum specified in the following schedule for each employee covered by this Agreement who has been on the payroll thirty (30) days or more.

EFFECTIVE	March 1, 1979	$10.00 Per Mo.
EFFECTIVE	March 1, 1980	$11.00 Per Mo.
EFFECTIVE	March 1, 1981	$12.00 Per Mo.

Section 2. Employers presently making payments to Teamsters Local 610 Prescripticare Trust Fund (or to a designated insurance agency), and Employers who may

subsequently begin to make payments, shall continue to make such payment for the life of this Agreement.

Section 3. By the execution of this Agreement, the Employer authorizes the Employers' Association which are parties hereto to enter into appropriate trust agreements necessary for the administration of such fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken (Page 25) by such trustees within the scope of their authority.

Section 4. If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of six (6) months. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months. If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions during the period of absence.

Section 5. Contributions to the Trust Fund (or to a designated insurance agency) must be made for each month on each regular employee, even though such employee may work only part-time under the provisions of this contract, and although contributions may be made for those months where work is performed for the Employer but not under the provisions of this contract, and although contributions may be made for those months into some other Fund.

Employees who work either temporarily or in cases of emergency under the terms of this contract shall not be covered by the provisions of this paragraph.

Section 6. The intent of this Article is to provide those benefits outlined in the Trust Agreement creating the Teamsters Local 610 Prescripticare Trust Fund and the parties hereby agree that any language change in this Article necessary to be in compliance to provide those benefits shall be agreed to and incorporated as though fully set out herein, as long as the basic intent of this Article is not changed by any additional, or modified language, and further that the schedule of payments may not be altered during the term of this agreement, by such automatic language change.

(Page 26) ARTICLE XVIII MAINTENANCE OF STANDARD (sic)

Section 1. The Company agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the minimum standards in effect in the Company's place of business at the time of the signing of this Agreement and that wherever any of the terms of this Agreement said improvements shall be made by the Company. (sic)

Section 2. The Company agrees not to enter into any agreement or contract with his employees, individually or collectively, which in any way conflicts with the terms and provisions of this agreement. Any such agreement shall be null and void.

ARTICLE XIX GENERAL PROVISIONS

Section 1. *Successors Clause.* This Agreement and Supplemental Agreements hereto hereinafter referred to collectively as "Agreement", shall be binding upon the parties hereto, their successors, administrators, executors and assigns.

It is understood by this Section that the parties hereto shall not use a third party to evade this Agreement. The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, lessee, assignee, etc., of the operation covered by this Agreement or any part thereof. Such notice shall be in writing with a copy to the Local Union, at the time the seller, transferee, or lessor executes a contract or transaction as herein described. The Local Union shall also be advised of the exact nature of the transaction, not including financial details.

Section 2. *No Strike and No Lockout.* Except as provided for in Article V, during the period of time that this Agreement is in force and effect, there shall not be a strike by the Union or lockout by the Company.

Section 3. *Inspection of Payroll Records.* The Company agrees to make available for inspection within five (5) days after written request by the Union, its payroll records with respect to any employee covered by this Agreement about whom (Page 27) a specific grievance has been filed. The Company shall not be considered as having violated the terms of this agreement should it refuse a request for such inspection before the opening of its business hours or after the close thereof, or on a Saturday, Sunday, or Holiday. The Company agrees to

open its payroll records with respect to the employees covered herein, when the Union by an independent audit, have (sic) reason to believe that the contract has or is being violated.

Section 4. *Examinations.* Physical, mental, or other examination required by a city, state or federal government body, or by the Company shall be promptly complied with by all employees; provided, however, the Company shall pay for all such examinations. Examinations are to be taken at the Employee's home terminal and are not to exceed one in any one (1) year, unless otherwise required by law, rule or regulation of any city, state or federal governmental regulatory body.

The Company reserves the right to select its own medical examiner or physician, and the Union may, if in its opinion it thinks an injustice has been done to an employee, have said employee re-examined at the Union's expense.

Section 5. *Employee Liability for Loss or Damage.* Employees may be charged for loss or damage to equipment or to household goods if the damages result from violation of the Company instructions, from lack of precautions, which a person of the same or similar experience would be expected to observe, or in spite of previous warnings or reprimands in regard to the same or similar circumstances.

Section 6. *Unsafe Equipment.* No employee shall be compelled to take out equipment that is not mechanically sound and properly equipped to conform with all applicable city, state and federal regulations.

Section 7. *No Unauthorized Riders.* No driver shall allow anyone other than employees of the Company who are on duty to ride on his truck, except with the written authorization of the Company.

Section 8. *Post Contract.* A copy of this Agreement shall be posted in a conspicuous place.

(Page 28) Section 9. *Union Responsibility.* The Union has responsibilities to the moving industry. It pledges to use all its available resources to enforce this contract agreement, make efforts to organize, support efforts to insure a full day's work by its members, create good relations between the Company and the Union. The Union will further try to inform the Public as to who the Union Moving and Storage Companies are.

ARTICLE XX LEAVES OF ABSENCE

Section 1. Any employee desiring leave of absence from his employment shall secure written permission from both the Union and the Company upon his making written application therefor, stating the reason for the leave if requested. An initial leave of absence shall be for thirty (30) days and may be extended for like periods, not to exceed ninety (90) days. Permission for same must be secured from both the Union and the Company. During the period of absence, the employee shall not engage in gainful employment within the industry. Failure to comply with this provision or misrepresentation of the reason for the leave shall result in the complete loss of seniority rights for the employees involved. Inability to work because of proven sickness or injury shall not result in the loss of seniority rights.

Section 2. *Funeral Leave.* An employee shall be paid for any absence from his scheduled work day, Monday through Friday, made necessary to attend the funeral on account of death in the immediate family, up to and including a maximum of three (3) such days, on the basis of eight (8) hours at straight time for each day of such absence. For the purpose of this article, immediate family means mother, father, spouse, brother, sister, a child of the employee, and mother-in-law, father-in-law, brother-in-law, and sister-in-law. The Company may request proof of the bona-fide nature of the necessary absence, including the occurrence of the death, the relationship of the employee to the deceased, and the employee's attendance at the funeral.

(Page 29) Section 3. *On-Job-Injury.* When an employee is unable to complete his day's work because of injury in the line of duty, he is to receive for the balance of the day, an amount equal to the employee's straight time hourly rate for each hour lost. Where an employee is required to go to the doctor during working hours because of injury arising out of his employment that same day, and would thereby lose working time, such visit shall be on the Employer's time.

ARTICLE XXI JURY AND ELECTION DUTY

Section 1. *Jury Duty:* When regular employees covered by this Agreement are called upon for jury duty, they shall promptly advise their Employment upon receipt of such call, and, if taken from their work for such service, shall be paid eight (8) hours' pay at their regular hourly rate less pay received from above duty, for each day of absence from work occasioned thereby. A

maximum of ten (10) days jury duty will be allowed during the life of this Agreement.

Section 2. *Elections—Voting Time:* The Employer agrees to respect and observe the present law as its (sic) pertains to giving employees time off to vote.

ARTICLE XXII MISCELLANEOUS PROVISIONS

1. The Union shall have the right to post union notices or notices of social gatherings on the bulletin boards furnished by the Company for the exclusive use of the Union.

2. A seniority list of regular employees arranged in the order of their dates of employment shall be displayed on the bulletin board at all times.

3. Should the Employer require any employee to be bonded, any premium involved shall be paid by the Employer.

4. Should the Company find it necessary to require employees to carry a record of full personal identification, such requirement shall be complied with by the employees. The cost of such personal identification shall be paid for by the Company.

5. If the Company requires its employees to wear uniforms, the Company shall pay the cost of the same. It shall be the duty of the employees to keep the uniforms clean.

(Page 30) ARTICLE XXIII TERMINATION

This Agreement shall become effective as of the first day of March, 1979, and shall remain in full force and ef-

fect until the 28th day of February, 1982, and each year thereafter, unless written notice of termination or desired modification is given at least sixty (60) days prior to any yearly expiration date by either of the parties hereto.

Should notice of termination or desired modification be given in the manner provided for above, the party desiring the same shall:

1. Offer to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modification.

2. Notify the Federal Mediation and Conciliation service within thirty (30) days after such notices of the existence of a dispute, and simultaneously therewith notify any state agency established to mediate disputes within the state provided no agreement has been reached by that time.

3. Continue in full force and effect, without resorting to strike or lock-out, all the terms and conditions of this agreement for a period of sixty (60) days after such notice is given or until the expiration date of this contract, whichever occurs later. In the process of bargaining in good faith, for a new contract or a contract containing the desired modifications, the parties recognize the fact that it may be necessary to continue their negotiations after the date upon which this agreement legally terminates and in order to provide for their duties and obligations for the period of time between the termination date of this contract and the date upon which they conclude a new contract or one containing the desired modifications, it is understood and agreed as follows:

1. The parties shall continue to bargain and negotiate in good faith in an effort to reach a complete agreement and understanding covering the terms and provisions of a new contract to take the place of this one or a contract containing the desired modifica-

tions, and such negotiations shall continue until either a complete agreement and understanding is reached or until either or both parties conclude that it is not probable that further negotiations will result in agreement.

2. All of the terms and provisions of this contract shall be continued in full force and effect and extended from the termination date hereof to such time as the parties either enter into a new agreement or agreement (sic) containing the desired modifications, or terminate further negotiations in the manner above mentioned.

3. Should the parties reach an agreement upon the terms and provisions of a new contract or a contract containing the desired modifications, at a time subsequent to the termination date of this contract, then, in such event all of the terms and provisions of the new contract, or the contract containing the desired modifications, shall be made retroactive to the termination date of this contract.

The Post Office Address of the Company is:

COMPANY: Prossers Mov. & Stg. Co.
2719 Delmar
St. Louis, Mo.

The Post Office Address of the Union is:

UNION: Miscellaneous Drivers and Helpers
Local No. 610
300 South Grand Boulevard
St. Louis Missouri, 63103

IN WITNESS WHEREOF, the parties hereto have signed and executed this and several other copies hereto the day and year hereafter noted.

COMPANY: Prossers Mov. & Stg. Co.
By /s/ Patrick Prosser
TITLE: Pres
DATE: 5/22/79

MISCELLANEOUS DRIVERS AND H E L P E R S UNION, LOCAL NO. 610, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

BY: /s/ Jerry Husgen
TITLE: Business Representative
DATE: 5-22-79

EMPLOYEES COMMITTEE:

Roger Goray, Unit Chairman
Lynn Boyer, Unit Recording Secretary
Richard Utley
Roy Williams
Richard Knupp

(Rec'd C. S. Contract Dept., May 31, 1979)

PROSSER'S MOVING & STORAGE CO.
2719 Delmar Blvd. St. Louis, Mo. 83103/
Phone: 652-2250

PROSSER'S MOVING & STORAGE COMPANY
SENIORITY LIST 5/22/79

CALVIN PERKINS	7/17/62
CHARLES CRAWFORD	4/10/70
DANIEL MOTHERWAY	6/13/70
JESSE PIGG	1/16/71
LAWRENCE WICKS (Owner Operator)	5/ 9/66
LEON BOWENS (Owner Operator)	3/12/70

MISCELLANEOUS DRIVERS & HELPERS,
LOCAL UNION No. 610

300 South Grand • • St. Louis, Mo. 63103

Telephone: 533-9030

Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America

John Metz
Secretary-Treasurer

July 20, 1979

Mr. Jim Lenihan - Mgr., Contract Department
Central States SE & SW Areas
Health & Welfare and Pension Funds
8550 West Bryn Mawr Avenue
Chicago, Illinois 60631

Dear Mr. Lenihan:

Enclosed you will find signed Modifications of Agreement for the following moving companys:

Emil Grass Moving and Storage
Prossers Moving and Storage
A. Herpers Moving Co.

We would appreciate anything you can do to speed up the billing for increased health and welfare benefits to these companies.

If you have any questions please call me at 314-533-3427.

Very truly yours,

TEAMSTERS LOCAL UNION 610
/s/ Jerry Husgen
Business Representative

JH/sg

(Rec'd C. S. Contract Dept., July 21, 1979)

MODIFICATION OF AGREEMENT

Agreement of Modification effective March 1, 1979 to February 28, 1982, by and between Prosser Moving & Storage Co. or its successors and Miscellaneous Drivers and Helpers Local No. 610 with reference to contributions to the Central States, Southeast and Southwest Areas Health and Welfare Fund.

The parties hereto agree to modify Article XV, Section 1, as follows:

Section 1. Effective March 1, 1979, the Employer shall contribute to the Central States, Southeast and Southwest Areas Health and Welfare Fund, which is to be administered jointly by the parties thereto, the weekly sum specified in the following schedule for each Employee covered by this Agreement who has been on the payroll Ninety (90) days or more; Effective March 1, 1979, $29.50 Per Week, Effective March 1, 1980, $29.50 per week, Effective March 1, 1981, $36.50 per week. These amounts are required by the Central States, Southeast and Southwest Areas Health and Welfare Fund to maintain the highest Health and Welfare Program.

All other terms and conditions of the signed Agreement shall remain in full force and effect.

COMPANY

By: /s/ Patrick Prosser
Title: Pres.

UNION

By: Teamsters Local 610
/s/ Jerry Husgen
Title: Business Representative

(Rec'd C. S. Contract Dept., July 21, 1979)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Cause No. 80-0379-C(B)

LORAN W. ROBBINS, *et al.*,

Plaintiffs,

vs.

PROSSER'S MOVING AND STORAGE COMPANY,
a Missouri corporation,

Defendant.

ANSWER

(Filed May 8, 1980)

Defendant, Prosser Moving and Storage Company, for its Answer to the Complaint states as follows:

1. Defendant denies each and every allegation set forth in paragraph 1 of the Complaint.

2. Defendant admits each and every allegation set forth in paragraphs 2 through 5 of the Complaint.

3. Defendant is without knowledge or information sufficient to form a belief as to the truthfulness and genuineness of Exhibits 1 through 6 to plaintiffs' Complaint and therefore denies same. Except as so denied, defendant admits the allegations of paragraphs 6, 7 and 8 of the Complaint.

4. Defendant denies each and every allegation set forth in paragraphs 9, 10 and 11 of the Complaint.

5. Further answering, defendant, for its first defense, states that this Court lacks subject matter juris-

diction over the claims and controversy raised in the Complaint in that plaintiffs have failed to exhaust inter contractual remedies of grievance and arbitration procedures as provided in the collective bargaining agreements.

6. Further answering, defendant, for its second defense, states that the matters at issue herein, and the interpretation of the collective bargaining agreements determinative of same, are subject to arbitration under said collective bargaining agreements, and that plaintiffs, themselves or on their behalf, or as third party beneficiaries under the collective bargaining agreements, have failed to allege that said arbitration procedures have been exhausted, and in fact plaintiffs have failed to exhaust their administrative remedies. The Complaint should therefore be dismissed in that (a) this Court lacks subject matter jurisdiction over the matters alleged therein; (b) the suit is premature and not ripe for judicial determination and (c) the Complaint fails to state a claim upon which relief can be granted.

7. Further answering, defendant, for its third defense, states that on or about April 19, 1977, Local 610 Union (sic), affiliated with Teamsters, Chauffers (sic), Warehousemen and Helpers of America, a labor organization, (hereinafter referred to as "Union"), made demand upon defendant for an audit of the company's payroll records pursuant to the terms of the collective bargaining agreement dated March 1, 1976; thereafter, Union filed a charge with the National Labor Relations Board (NLRB) alleging, *inter alia*, an unfair labor practice by reason of the defendant's refusal to allow an audit of said records, which charge was deferred and subsequently dismissed on January 4, 1978, after Union informed the NLRB that

it did not intend to invoke the contractional provisions providing for arbitration. Plaintiffs, acting through their representative and agent, Union, by submitting to the jurisdiction of the NLRB, is estopped from now asserting its claims as alleged in the Complaint herein.

8. Further answering, defendant, for its fourth defense, states that Union, which has not been joined in this action, is a person needed for a just adjudication within the meaning of Rule 19, F.R.Civ.P., in that Union was and is a party to the collective bargaining agreements and the exclusive bargaining agency for the employees of defendant and beneficiaries of plaintiffs' Trust funds. This action cannot in good conscience and equity be permitted to proceed in Union's absence, in that no final judgment can be entered which will do justice between the parties without injuriously affecting Union's and defendant's rights, and failure to join Union will subject defendant to a substantial risk of incurring inconsistent obligations to the plaintiffs and Union, therefore, the Complaint should be dismissed for failure to join an indispensable party.

9. Further answering, defendant, for its fifth defense, states that plaintiffs are not entitled to maintain this suit for an accounting under the collective bargaining agreement dated March 1, 1976 effective to February 26, 1979 in that plaintiffs have waived their rights under said contract by failing to exercise said rights prior to the collective bargaining agreement's expiration.

10. Further answering, defendant, for its sixth defense, states that plaintiffs have failed to seek a determination of their alleged rights during the term of the collective bargaining agreement dated March 1, 1976, which

expired February 26, 1979, that defendant has relied upon plaintiffs' acquiescence and delay to its detriment, and plaintiffs are thereby estopped, and barred by the doctrine of laches, from now maintaining this suit based upon purported acts of the defendant allegedly constituting a breach of the rights of plaintiffs under said collective bargaining agreement.

11. Further answering, defendant, for its seventh defense, states that the Complaint fails to state a claim against defendant upon which relief can be granted.

WHEREFORE, having fully answered, defendant prays that the Complaint be dismissed with prejudice, and for its costs.

UTHOFF AND WURMSER

By: /s/ Bruce M. Wurmser M.B.E. 24285
Gary S. Uthoff M.B.E. 22225
1015 Locust St., Suite 420
St. Louis, Missouri 63101
621-9550

Attorneys for Defendant

/s/ Charles W. Bobinette M.B.E. 23550
1015 Locust St., St. Louis, Mo. 63101
621-4150

Attorney for Defendant

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Cause No. 80-0379C(B)

LORAN W. ROBBINS, *et al.*,
Plaintiffs,

vs.

PROSSER'S MOVING AND STORAGE COMPANY,
a Missouri corporation,
Defendant.

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

(Filed September 2, 1980)

Comes now defendant, Prosser Moving and Storage Company, and for its Motion to Dismiss Plaintiff's Complaint for Lack of Subject Matter Jurisdiction and For Summary Judgment pursuant to Rules 12(h) (3) and 56, Federal Rules of Civil Procedure, states:

1. Plaintiffs, trustees for the Central States Pension Fund and Health and Welfare Fund, have filed a Complaint herein against defendant seeking an accounting and money damages for alleged past non-contribution to the funds by defendant.

2. Plaintiffs' Complaint alleges jurisdiction of their claims based on two grounds:

(A) Section 301(a) of the Labor Management Relations Act of 1947, as amended, (29 U. S. C. Section 185 (a)); and

(B) Section 502 of the Employee Retirement Income Security Act of 1974, (29 U. S. C. Section 1132).

3. Section 301(a) of the Labor Management Relation Act of 1947, as amended (29 U. S. C. Section 185(a)) provides jurisdiction to this Court for claims arising from a breach of a collective bargaining agreement (herein alleged); however, intra contractual remedies must first be exhausted via the grievance and arbitration procedures before judicial relief can be sought.

4. The collective bargaining agreements (attached to Plaintiffs' Complaint as Exhibits 1 and 2 and covering the period of time relevant hereto) each provide a compulsory arbitration procedure to resolve disputes involving the issues raised by plaintiffs' Complaint; plaintiffs are therefore required to submit their claims to arbitration before instituting suit.

5. Plaintiffs fail to state in their Complaint that they have sought or exhausted the arbitration procedures under the aforesaid collective bargaining agreements; plaintiffs in fact have not sought nor exhausted said arbitration procedures.

6. Section 502 of the Employee Retirement Income Security Act of 1974 (29 U. S. C. Section 1132) creates a federal civil action and provides jurisdiction to beneficiaries and participants of a plan for legal relief, and jurisdiction to fiduciaries, such as plaintiffs, for equitable relief.

7. Section 502 of the Employee Retirement Income Security Act of 1974 (29 U. S. C. Section 1132) did not preempt or modify the presumptive preference for arbi-

tration under the National Labor Relations Act nor prevent contracting parties from agreeing that intra contractual grievance and arbitration procedures be exhausted before seeking judicial relief; plaintiffs are therefore required to submit their claims to arbitration before instituting suit.

8. This Court therefore lacks subject matter jurisdiction over plaintiffs' Complaint, or in the alternative, summary judgment in favor of defendant should be granted on plaintiffs' Complaint.

WHEREFORE, defendant moves this Court to dismiss plaintiffs' Complaint for lack of subject matter jurisdiction, or in the alternative to grant summary judgment in favor of defendant on plaintiffs' Complaint.

UTHOFF AND WURMSER

By /s/ Bruce M. Wurmser, M.B.E. 24285
1015 Locust Street, Suite 420
St. Louis, Missouri 63101
621-9550

Attorneys for Defendant

/s/ Charles W. Bobinette, Esq. by BMW
1015 Locust Street, Suite 1140
St. Louis, Missouri 63101
621-4150

Attorney for Defendant

(Certificate of Service omitted in printing.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Cause No. 80-0379-C(B)

LORAN W. ROBBINS, *et al.*,

Plaintiffs,

vs.

PROSSER'S MOVING AND STORAGE COMPANY,
a Missouri corporation,

Defendant.

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

I, Patrick M. Prosser, being duly sworn upon my oath, state:

1. I am the President of the named defendant, Prosser Moving and Storage Company, a Missouri corporation.

2. On or about May 2, 1976, in my capacity as President of defendant, I executed a Collective Bargaining Agreement with Miscellaneous Drivers and Helpers, Local Union No. 610, covering a period between March 1, 1976 through February 26, 1979. A copy of said agreement is attached to plaintiffs' Petition as Exhibit No. 1.

3. On or about April 20, 1977, I received a letter dated April 19, 1977 from Mr. Clyde Craig, attorney for Local No. 610 demanding an inspection of the company's payroll records and an audit of the company's records to

determine whether the collective bargaining agreement had been breached by the company's failure to provide to certain employees seniority and "other" benefits provided by the contract. A copy of this letter is attached hereto and marked Exhibit A to this Affidavit.

4. After the company would not agree to allow an inspection and audit of its payroll records, the union, Local 610 filed a complaint with National Labor Relations Board charging a violation of Sections 8(a) and (5) of the Labor Management Relations Act.

5. On or about July 22, 1977, the National Labor Relations Board declined to issue a complaint on the union charge, stating for its reasons that Prosser Moving and Storage was willing to arbitrate the dispute and that said dispute was within the scope of the arbitration procedure. A copy of the N. L. R. B. decision is attached hereto and marked Exhibit B, and made a part of this Affidavit.

6. On or about January 4, 1978, the National Labor Relations Board dismissed the charge of union Local 610 because the union did not intend to submit the issue to arbitration. A copy of the N. L. R. B. decision is attached hereto and marked as Exhibit C, to this Affidavit.

Further, I sayeth not.

/s/ Patrick H. Prosser

State of Missouri)
County of St. Louis) ss.

Before me this 24th day of September, 1980, personally appeared Patrick H. Prosser, personally known to me, who, having been duly sworn upon his oath, stated that the matters set forth in his foregoing Affidavit are true

and correct to the best of his knowledge, information and belief.

/s/ Bruce M. Wurmser
Notary Public

My commission expires: Bruce M. Wurmser, Notary Public—State of Missouri, St. Louis County. My Commission expires Sept. 24, 1983.

UTHOFF, WURMSER AND GRAEBER

By /s/ Bruce M. Wurmser M. B. E. 24285
1015 Locust Street - Suite 420
St. Louis, Missouri 63101
621-9550

Attorneys for Defendant

Charles W. Bobinette, Esq.
1015 Locust Street—Suite 1140
St. Louis, Missouri 63101
621-4150

Attorney for Defendant

(Certificate of Service omitted in printing.)

EXHIBIT A

WILEY, CRAIG, ARMBRUSTER, WILBURN & MILLS

Attorneys and Counselors

John T. Wiley
Harry H. Craig
Norman W. Armbruster
Earl B. Wilburn
Richard D. Mills
Clyde E. Craig
Barbeau A. Roy

Suite 717 Buder Building
Market Street at Seventh

St. Louis, Missouri 63101

Area Code 314
231-1018

April 19, 1977

Prossers Moving
2719 Delmar
St. Louis, Missouri 63103

Gentlemen:

This is to inform you that Teamsters Local Union No. 610 has reason to believe that its contract with your company has or is being violated by employment of persons in classifications covered by the contract without providing to such persons seniority and other benefits provided by the contract.

Pursuant to the provisions of Section 20.14 of the contract the Union requests that the company make available for inspection its payroll records with respect to employees covered by the contract. The audit will be conducted by Dwyer, Costello & Company, and the company will be supplied with the results of the audit upon its completion. The Union's auditor will cooperate with the company in every way possible to insure that there is no substantial inconvenience or disruption of the normal operation of your business.

Please contact the undersigned upon receipt of this letter so that mutually satisfactory arrangements may be made for the audit. Thank you in advance for your anticipated cooperation.

Very truly yours,
/s/ Clyde E. Craig

CEC/kmk

cc: Mr. Glen Boyer
Business Representative
Teamsters Local Union No. 610
300 South Grand Blvd.
St. Louis, Missouri 63103

Mr. Jack Dwyer
Dwyer, Costello & Company
812 North Third Street
St. Louis, Missouri 63102

EXHIBIT B

NATIONAL LABOR RELATIONS BOARD
REGION 14

Room 448, 210 North 12th Boulevard
St. Louis, Missouri 63101 Telephone 425-4166
July 22, 1977

Re: Prossers Moving
Case No. 14-CA-10329

Prossers Moving
Attn: Frank Murphy
Operations Manager
2719 Delmar
St. Louis, Missouri 63103

Mr. Clyde E. Craig
Attorney at Law
7 North Seventh Street
St. Louis, Missouri 63101

Gentlemen:

In accordance with the National Labor Relations Board's decision in *Collyer Insulated Wire,* 192 NLRB 837, and pursuant to "Arbitration Deferral Policy Under *Collyer* - Revised Guidelines" publicly issued by the General Counsel on May 10, 1973, I am declining to issue a complaint on the instant charge based on my determination that further proceedings on the charge should be administratively deferred for arbitration.

My reasons for deferring the charge are as follows:

1. The charge alleges a violation of Section 8(a) (1) and (5) relating to an alleged refusal to furnish information relevant to the administering of the collective-bargaining agreement between the Employer and the Charging Party.

2. The question of whether there has been a refusal to furnish such information constituting a failure to bargain collectively is a matter apparently within the substantive provisions of the collective-bargaining agreement in effect between the Union and the Employer and is a question which may be resolved by an arbitrator under the terms and conditions of the agreement.

Prossers Moving
Case No. 14-CA-10329 July 22, 1977

3. On July 20, 1977, this office was notified by Employer Prossers Moving that it is now, and for a reasonable period of time has been, willing to arbitrate the dispute underlying the charge in the above-captioned case, notwithstanding any contractual time limits on filing or processing to arbitration of such grievance or the subsequent expiration of the contract.

4. The grievance procedure of the collective-bargaining agreement currently in effect between the Union and the Employer provides for arbitration and makes the results reached in arbitration procedure binding on the parties.

Under Section 102.19 of the National Labor Relations Board's Rules and Regulations, the charging party may obtain a review of my administrative determination to defer further proceedings on this charge by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D. C. 20570, addressing a copy of the appeal to this Office. This appeal must contain a complete statement of the facts and reasons on which it is based. The appeal must be received by the General Counsel in Washington, D. C., by 5:00 p. m. on August 4, 1977. For good cause shown, however, the General Counsel may grant special permission to extend

the time for filing. A request for an extension of time to file an appeal must be in writing and received by the Office of Appeals prior to August 4, 1977; a copy of such request should be filed with this Office. If the General Counsel determines that deferral of this charge to arbitration is unwarranted, the case will be remanded to me for appropriate action. But if the General Counsel sustains my decision, the case will be remanded to me for deferral as set forth herein.

It is also my intention to inquire as to the status of this dispute periodically, and no later than 90 days hence, and to accept and consider at any time requests and supporting evidence submitted by any party to this matter for dismissal of the charge, for continued deferral of administrative action on the charge, or for issuance of a complaint.

It is my intention to dismiss the charge in the event the charging party does not promptly submit the dispute underlying the charge to the contract arbitration procedures, or in the event the charging party notifies me in writing that it does not intend to submit the dispute to arbitration.

It is my intention to revoke my decision to defer and to resume processing of the charge in the event the respondent, by conduct inconsistent with its expression of a willingness to arbitrate, prevents or impedes the prompt resolution of the underlying dispute through the contract grievance-arbitration procedures.

Prossers Moving
Case No. 14-CA-10329 July 22, 1977

If the dispute underlying the charge is not resolved amicably under the grievance procedure, and resort to arbitra-

tion proves necessary, the charging party may obtain a review of the arbitrator's final award by addressing a request for review to this Office. The request should be in writing and contain a statement of the facts and circumstances bearing on whether the arbitral proceedings were fair and regular; whether the unfair labor practice issues which gave rise to the charge were considered and decided by the arbitrator; and whether the award is consonant with the purposes and policies of the Labor Management Relations Act. *Spielberg Mfg. Co.*, 112 NLRB 1080.

Very truly yours,

/s/ Joseph H. Solien
Regional Director

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

cc: General Counsel
Office of Appeals
National Labor Relations Board
Washington, D. C. 20570

Miscellaneous Drivers and
Helpers Union, Local 610
300 South Grand Blvd.
St. Louis, Missouri 63103

smz

EXHIBIT C

NATIONAL LABOR RELATIONS BOARD
Region 14
Room 448, 210 North 12th Boulevard
St. Louis, Missouri 63101 Telephone 425-4173
January 4, 1978

Re: Prossers Moving
Case No. 14-CA-10329

Mr. Clyde E. Craig
Attorney at Law
7th North Seventh St.
St. Louis, Missouri 63103

Dear Mr. Craig:

By letter dated July 22, 1977, the undersigned administratively deferred further action on the charge in the above matter for arbitration of the underlying dispute pursuant to the grievance-arbitration procedures of the applicable collective-bargaining agreement. The undersigned stated in said letter that it was his intention to dismiss the charge in the event the charging party did not promptly submit the dispute underlying the charge to the contract arbitration procedure, or in the event the charging party stated in writing that it did not intend to submit the dispute to arbitration.

As the charging party informed this office on December 19, 1977, that it does not intend to invoke the contractual provisions providing for arbitration, I am, therefore, dismissing the charge in the above-captioned case.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D. C. 20570 and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C. by the close of business on January 17, 1978. Upon good cause shown, however, the General Coun-

sel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to me.

Prossers Moving
Case No. 14-CA-10329 January 4, 1978

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NOS. 82-1860 and 82-1862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PROSSER'S MOVING AND STORAGE COMPANY,
a Missouri corporation,
Petitioner,

and

SCHNEIDER MOVING AND STORAGE COMPANY,
Petitioner,

vs.

LORAN W. ROBBINS, et al., TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS,
Respondents.

TRUSTEES' CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Since they are not parties to the collective bargaining agreement and do not have direct access to its grievance mechanisms, may the trustees of employee benefit funds, as fiduciaries under ERISA and as third-party beneficiaries of the labor agreement, proceed directly to court to collect delinquent contributions and to compel audits of contributing employers' records even though these employers allege that their disputes with the funds require interpretation of the collective bargaining agreement and therefore prior arbitration?

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NOS. 82-1860 and 82-1862

In the

Supreme Court of the United States

October Term, 1982

PROSSER'S MOVING AND STORAGE COMPANY,
a Missouri corporation,
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and
SCHNEIDER MOVING AND STORAGE COMPANY,
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LORAN W. ROBBINS,[1], et al., TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS,
Respondents.

TRUSTEES' CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' STATEMENT OF THE CASE

Petitioners are public movers operating in and around St. Louis, Missouri. Respondents are the Trustees of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, two of the largest Taft-Hartley multiemployer employee benefit funds in the United States. For all times relevant to the underlying lawsuits, Prosser and Schneider were parties to collective bargaining agree-

[1] Respondents are: Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley, and R.V. Pulliam, Sr., Trustees of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds. Thomas F. O'Malley has been replaced by Arthur H. Bunte, Jr. Earl L. Jennings, Jr. is also a Trustee.

ments with Local 610, affiliated with the International Brotherhood of Teamsters. These agreements required Prosser and Schneider to make specified weekly contributions to the Central States Funds on behalf of all persons covered by the agreements (Appellants' Brief, pp. 5-10).

In March, 1977, and again in May, 1979, Central States conducted an audit of Schneider and rebilled the company. On both occasions, Schneider ignored the audit findings and the Funds' rebilling, contending that the company had paid what it thought it owed (Appellants' Brief, pp. 17-18). In April, 1980, the Trustees filed an action to collect the delinquencies assessed against the company. Schneider filed a Motion to Dismiss on the grounds that the alleged delinquencies sought to be collected involved employees who were not covered by the collective bargaining agreement, and that the Trustees had no standing to bring the action until the contract was interpreted through the appropriate grievance mechanism.

The collective bargaining agreement in question did not permit *the Trustees* to invoke the grievance clause, notwithstanding the fact that problems of interpretation might be involved in a claim against the company (Appellants' Brief, pp. 15-16). Nor could the employer invoke it. Nevertheless, nothing in the record indicated that Schneider had ever attempted to discuss its "coverage" problems with the Union although "coverage" disputes with the Trustees existed since the first audit.

Only the Union could set the grievance mechanism in motion. Significantly, by the time Schneider filed a Motion to Dismiss the Trustees' collection action on account of their failure to exhaust intracontractual remedies, the Union had already been decertified for more than a year; moreover, the collective bargaining agreement had expired (Appellants' Brief, pp. 17-20).

The gravamen of the Trustees' Complaint against Prosser was that Prosser refused to permit an audit of the company's "pertinent records" as specified in the Trust Agreements governing the Health and Welfare and Pension Funds. Although Prosser's collective bargaining agreement expressly incorporated the Trust Agreements by reference (Appellants' Brief, pp. 14, 20-22), the company contended that the scope of the Trustees' administrative authority, as applied to it, required contractual interpretation. Hence prior submission to arbitration was necessary.

The District Court decided the *Schneider* and the *Prosser* cases on the same date, making no distinction between matters involving trust administration, as set forth in the operative Trust Agreements, and matters related to bargainable issues, such as coverage under the collective bargaining agreement (Appellants' Brief, pp. 14-15). It therefore dismissed both Trustee actions for the same failure to exhaust intracontractual mechanisms, notwithstanding the fact that the Trustees could not invoke the grievance mechanism of the collective bargaining agreement themselves and notwithstanding the fact that Prosser and Schneider were bound by Trust Agreements which expressly provided that actions taken by the Trustees were independent of any actions taken by the Union.

Recognizing that the Trustees would be dependent on the Union to invoke the grievance clause on their behalf, and that this would be inconsistent with national pension policy and recent decisions of this Court, a panel of the court of appeals reversed. Following a rehearing *en banc*, the court affirmed the panel decision by a majority of 6-2.

REASONS FOR NOT GRANTING THE PETITIONS

The decision of the Court of Appeals for the Eighth Circuit *en banc* is consistent with national pension policy and established labor law as interpreted by this Court and the courts of various circuits.

1. Introduction

By a 6-2 majority, the Court of Appeals for the Eighth Circuit *en banc* held that "trustees may come into court without first getting the union to invoke the machinery of arbitration" (A-19).[2]

This holding formed the conclusion of a relatively lengthy, well-reasoned opinion replete with references to statutory and judicial authority, including several of the most recent cases in which this Court dealt with the differences between Unions and employee benefit funds, mandated strict neutrality in trustee decision making, and rejected arbitration as an appropriate vehicle for the ultimate vindication of individual statutory rights. *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981); *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728 (1981).

The rationales of these cases do not support mandatory deferral to arbitration in the trustee-beneficiary context of ERISA and the LMRA, as the Eighth Circuit found. Without so much as mentioning these cases (*See* "Table of Authorities" in both Petitions), Prosser now contends that the Eighth Circuit decision is inconsistent with federal labor law and Schneider argues that the decision is also inconsistent with national pension policy. The fact is, however, that while employee benefit law is still in its genesis, two pronouncements from this Court have emerged with striking clarity: trust administration is qualitatively different from collective bargaining and trustees must function independently in order to fulfill the neutral fiduciary role Congress has assigned to them. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981).

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[2] All references to the court of appeals' decision will henceforth follow the page numbers assigned to the case in Prosser's Appendix to the Petition (Appendix A).

The Eighth Circuit carefully examined policy questions articulated in these and other decisions of this Court.[3] It also analyzed "the relationship between unions and 302(c)(5) funds" (A-10). As a result of these considerations, the court of appeals not only decided the *Schneider* and *Prosser* cases in favor of the Trustees of the Central States Funds; it also substantially overruled three of its prior decisions mandating arbitration: *Farmer* v. *Fisher*, 586 F.2d 1226 (8th Cir. 1978); *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST*, 641 F.2d 616 (8th Cir. 1981); and *Layne-Western Co., Inc.* v. *International Union of Operating Engineers*, 650 F.2d 155 (8th Cir. 1981). In support of these reversals, the court stated:

> *Stare decisis* is an important aspect of the judicial process, but sometimes it is more important to be correct than to be consistent. (A-10)

It is rare that a court of appeals *en banc* overrules its prior decisions in so prominent and decisive a manner. It would not have done so had it not been clearly persuaded of the correctness of its most recent holding in light of contemporary law. And, indeed, the correctness of the decision has been borne out. Notwithstanding a split of authority in the circuits (and therefore the possibility of choice) the Fifth Circuit recently followed the Eighth Circuit, finding "the Eighth Circuit's analysis more persuasive." *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983).

The decision should stand since it is eminently correct. To the extent that a conflict in the circuits can still be said

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[3] The court also referred to the following Supreme Court decisions, finding them both relevant and persuasive in resolving the issue at bar: *Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960); *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982).

to exist notwithstanding subsequent related decisions of this Court, it will shortly resolve itself as a "majority view" clearly emerges. Thus, review by this Court is not necessary.

2. Mandatory deferral to arbitration of routine matters of trust administration — audits and collections — does not promote trustee independence as required by Congress, this Court and the courts of various circuits.

In *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982), this Court confirmed that in enacting 302(c)(5) of the LMRA, Congress intended that benefit funds be completely independent of Union control. For this very reason, district courts have long refused to dismiss trustee collection actions for failure to exhaust the grievance mechanisms of collective bargaining agreements: *Wishnick* v. *One Stop Food and Liquor Store, Inc.*, 359 F. Supp. 239 (N.D. Ill. 1973); *Todd* v. *Casemakers, Inc.*, 425 F. Supp. 1375 (N.D. Ill. 1977); *Central States, Southeast and Southwest Areas Pension Fund* v. *Gratiot Oil and Gas Services*, 517 F. Supp. 811 (W.D. Mich. 1981). Indeed, prior to 1979, there was only *one single* reported instance of deferral, *IBEW, Local 308* v. *Dave's Electric Service*, 382 F. Supp. 427 (M.D. Fla. 1974).[4] Although *Dave's Electric* was a pre-ERISA case, it provided in its turn the principal judicial basis for the *only* circuit court opinion in *direct* conflict with the case at bar, *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin*, 625 F.2d 171 (7th Cir. 1980), *infra*.

ERISA did not alter this mandate of independence; indeed, 29 U.S.C. § 1105 makes "trustee responsibilities" nondelegable. And, if any actions can be regarded as falling within the scope of "trustee" or fiduciary responsibilities, it is the conducting of field audits to verify the accuracy of reporting and the filing of lawsuits to collect delinquent contributions. *See Rosen* v. *Hotel and Restaurant*

[4] Remanded on other grounds, 545 F.2d 987 (5th Cir. 1977).

Employees, Local 274, 637 F.2d 592 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 398 (1981). Indeed, failure to collect delinquent contributions, except under very limited circumstances, is a prohibited transaction under 29 U.S.C. § 1106. *See* DOL and IRS Regulation 76-1 (41 F.R. 12740; March 26, 1976).[5]

Consistent with the goals of the LMRA and ERISA, which were designed to safeguard employee benefits, trustee independence in the area of audits and collections cannot be diluted through forced reliance on Unions whose interests may not always be consonant with those of the funds and over whom the trustees have no control. Indeed, such reliance cannot be reconciled with the fact that fund trustees stand completely outside of the collective bargaining process, are not the agents of those who appoint them, owe undivided loyalty to participants and beneficiaries, and must maintain strict neutrality with uncompromising rigidity. *See NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981).

Mandatory deferral to an arbitration process which they cannot invoke places fund trustees in just such a position of involuntary reliance. As the Fifth Circuit recently noted: "By carelessness or deliberate refusal to act, the Union

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[5] Contributions owed to employee benefit funds are regarded as "fund assets." Thus, contributions owed but not paid constitute an "extension of credit between the plan and a party in interest," which is a prohibited transaction under ERISA (29 U.S.C. §1106(a)(1)(B)). In March, 1976, the DOL and the IRS created a class exemption from this prohibited transaction by permitting trustees to settle or compromise claims against delinquent employers for less than the full amount based on such factors as whether or not a judgment could be collected. The trustees' decisions in this regard would still be subject to challenge under the "prudent man" rule of ERISA. In granting this exemption, the DOL and the IRS relied on the fact that employee benefit funds have systematic procedures for collecting delinquent contributions and for reviewing employer accounts. Thus, the exemption was designed only for those cases in which application of full-scale collection procedures would not be prudent on a cost-analysis basis or for other reasons. The Regulation makes clear that trustees who do not take vigorous action to collect delinquent contributions are in danger of committing a prohibited transaction.

could completely thwart the Trustees' ability to administer and ensure payments to the trust funds. Though in full possession of their fiduciary duties, the Trustees could exercise their fiduciary powers only at the Union's discretion. Such a situation would completely violate the Congressional directive that control of fringe benefit funds shall not rest with the unions." *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983).

In rejecting Petitioners' exhaustion argument, the Eighth Circuit did not rely solely on the bare text of Section 302(c)(5) of the LMRA and equivalent provisions of ERISA, and it did not indulge in legal abstractions. Referring instead to such decisions as *Allied Chemical & Alkali Workers of America, Local 1* v. *Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157 (1971), the court set forth several concrete and practical reasons why reliance on Unions to protect the interests of employee benefit funds and plan participants would be misplaced (A-16-18). Most importantly, the court observed that if money is limited, as it usually is, choices must be made and priorities established. In this situation, the Union's primary interest, quite properly, would lie in keeping as many of its members working as possible. Certainly, it would be reasonable for it to seek *first* to protect the wages of active members of the bargaining unit and *only then* to secure the retirement benefits of former employees or their families. As the court noted, the latter persons may no longer be members of the bargaining unit whom the Union has an affirmative duty to represent. Conversely, the trustees of employee benefit funds owe fiduciary obligations to *precisely* such persons.

Priorities based on economic necessities are perfectly legitimate. Thus, it is well-established law that the duty of fair representation does not prevent Unions from making economic decisions that have a discriminatory effect. *See United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982). Indeed, recognizing that such decisions are legitimate, the Third Circuit

stressed why Union domination of a trust fund would result in precisely the kind of conflict of interest that Section 302(c)(5) of the LMRA was designed to prevent by requiring neutral and independent administration of Taft-Hartley funds. *Nedd* v. *United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977). Petitioners have not addressed any of these cases.

In the case at bar, the district court relied "largely" on *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin*, 625 F.2d 171 (7th Cir. 1980), as the Eighth Circuit pointed out in its reversal (A-2). So, naturally, do Prosser and Schneider in their Petitions.

In *Howard Martin, supra*, a panel of the Seventh Circuit decided that if a question of employee coverage under a collective bargaining agreement was raised, an employer could not be regarded as "delinquent" for the purposes of a trustee collection action until the contract was first interpreted through the appropriate grievance mechanism. In other words, the trustees could not go directly to court to have such contractual disputes adjudicated. (The issue in Howard Martin was whether "emergency" or "temporary" employees were "covered" by the contract and hence eligible for contributions.) Significantly, the court acknowledged that the trustees did not have access to the grievance mechanisms of the National Master Freight Agreement in question because the contract expressly provided that these mechanisms could be set in force "only by the authorized Union representative or by the employer." The court nevertheless rejected as meritless the Fund's contention that the trustees should not be required to exhaust mechanisms which they are not contractually empowered to invoke. The court stated:

> The argument falls of its own weight, however. To trigger the arbitration process, the Funds need only inform the Union, the members of which the funds exist to serve, that Martin disputes the coverage of certain

> workers and ask the Union, the organization of primary interest, to file a grievance against Martin.[6]

In so concluding, the Seventh Circuit not only ignored an express provision of the collective bargaining agreement, it also failed totally to examine the implications of its decision for the mandate of trustee independence.

Howard Martin was decided in July, 1980. As of October 13, 1982 when the Eighth Circuit *en banc* heard oral argument in the case at bar, no grievances had been adjudicated although delinquencies were still outstanding.[7] Thus, Respondents were not dealing in hypotheticals, as the dissent believed (A-23; Prosser's Petition, p. 12). The majority's concern that Unions cannot "be expected to act so readily in the fund's interests" (A-16), however legitimate the reasons may be, was borne out in this instance. In the case of Schneider, the Union was, in fact, *decertified* when the Trustees filed their collection action, a fact noted by the Eighth Circuit (A-4/17) but omitted from Schneider's "Statement of the Case" (Petition, pp. 2-4).

In sum, there is no authority to suggest that employee benefit funds or their trustees can compel Unions to arbitrate. The Union does not stand in a fiduciary relationship to the trustees as it does to the members of the bargaining unit

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[6] These statements are inaccurate. In the first place, Union membership is not a prerequisite for coverage under the collective bargaining agreement; an employee is "covered" and hence entitled to contributions based on hours of service performed in a job classification described in the contract. Moreover, the Union is not the organization of primary interest with regard to health and welfare and pension contributions. As noted above, contributions owed are fund assets not assets of the employer or the Union. When collected, these monies are pooled and invested on behalf of all participants and all beneficiaries of multiemployer plans, not on behalf of the members of a particular local Union or a particular employer. This is why trustees are commonly regarded as the proper party to bring collection actions, although the employer's obligation is established in the collective bargaining agreement. See *Lewis* v. *Quality Coal Co.*, 243 F.2d 769 (7th Cir. 1957).

[7] *See* Transcript of oral argument, p. 36, lines 8-13.

it represents. Thus, such cases as *Vaca* v. *Sipes*, 386 U.S. 171 (1967), or *Bowen* v. *U.S. Postal Service*, 459 U.S. ____, 103 S. Ct. 588 (1983), which delineate paths of redress available to employees who believe that their Union has failed them in the performance of its statutory duty of fair representation, are inapposite. Question II of Prosser's "Questions Presented" is not only ill-conceived; it is not buttressed by persuasive argument and should not be reviewed.[8] Significantly, *Howard Martin* was decided before *United Mine Workers* v. *Robinson*, *supra*, and before *NLRB* v. *Amax Coal Co.*, *supra*; *Robbins* v. *Prosser* and *Bugher* v. *Consolidated X-Ray Service Corp.*, *supra*, which reject the *Howard Martin* approach, were decided *after* these Supreme Court decisions. At the very least, *Howard Martin* conflicts with the mandate of trustee independence articulated in these more recent decisions.

3. Mandatory deferral to arbitration conflicts with national pension policy as articulated in ERISA and the MEPPAA.

In enacting ERISA, Congress sought to prevent the great personal tragedies that had occurred in the past when employees reached retirement age only to discover that the benefits they had worked for and expected were not available due, among other things, to improvident or careless trust administration. *See Nachman Corp.* v. *PBGC*, 446 U.S. 359, 374-375 (1980). Among the goals to be promoted by the new Act were the establishment of "standards of conduct, responsibility and obligation for the fiduciaries of employee benefit plans" (29 U.S.C. § 1001(b)).

Under ERISA, the trustees of such plans were given "exclusive authority and discretion to manage and control the assets of the plan" (29 U.S.C. § 1103), and "trustee responsibilities" were generally conceived to be "nondeleg-

[8] Question II states: If, in the foregoing instance, third-party beneficiary fund trustees are not required to defer litigation of their claims pending arbitration, must they, at the least, plead and prove that it would be futile to request the union to properly initiate and pursue arbitration of such questions of contract interpretation?

able" (29 U.S.C. § 1105). While the details of trust administration were to be set forth in mandatory written trust instruments (29 U.S.C. § 1102), the trustees were subject to an overriding statutory obligation to act "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims" (29 U.S.C. § 1104(a)(1)(B)).

ERISA also requires pension funds to credit an employee with service toward the vesting of his benefits even where his employer never remitted corresponding contributions (29 U.S.C. §§ 1052(a)(3)(A)(C); 1053(b)(2)(A); 29 C.F.R. § 2530.220b-2(a)(1)(2). In other words, eligibility for benefits is a function of hours worked under a collective bargaining agreement and not a function of employer contributions.[9] An employee is "covered" by the collective bargaining agreement if he performs work in a job classification described in the contract. Union membership *is not* a prerequisite for coverage, *supra*, fn. 6.

In enacting ERISA, Congress clearly imposed upon the trustees of employee benefit funds a nondelegable fiduciary duty to take all reasonable steps to assure that contributions to the funds correlate with disbursements from them. Since employees cannot be estopped from asserting claims on the grounds that their employer did not make contributions as required by the collective bargaining agreement, trustee diligence in this area is particularly important to prevent a drain on fund assets. Systematic audits of employer accounts to verify the completeness and accuracy of reporting and vigorous action to collect delinquent contributions obviously further the goal of assuring that contributions and disbursements correlate.

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[9] The Department of Labor requires that credit be given "*solely on the basis of service performed for a participating employer, regardless of whether that employer...has made or defaulted on his required contributions.*" Advisory Opinion Letter, 31 August 1976, BNA *Pension Reporter*, No. 221, Jan. 8, 1979, R-24 (A-71) (emphasis supplied).

Conversely, mandatory deferral to arbitration, which requires Union intervention, impedes the trustees in the exercise of a basic fiduciary duty and also causes delay. It need hardly be said that delays in collecting delinquent contributions are inherently detrimental to employee benefit funds because of the risk of employer bankruptcies, a risk that is particularly great when economic conditions are uncertain.[10] Contributions owed but not paid are fund assets; however, employee benefit funds are both involuntary and unsecured creditors, and hence enjoy a very limited priority under the Bankruptcy Reform Act of 1978, 11 U.S.C. § 501, *et seq.*

The exhaustion doctrine is particularly inconsistent with national pension policy as reflected in the Multiemployer Pension Plan Amendments Act of 1980 (Pub. L. No. 96-364), an Act in which Congress undertook to make some fundamental revisions of ERISA.

ERISA did not cure the problem of delinquent contributions. Indeed, in the six years following its passage, the problem of delinquent contributions assumed such magnitude that Congress created a new and distinct cause of action for their collection (29 U.S.C. § 1145).[11] Moreover, to encourage correct reporting and to deter evasions, Con-

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[10] In *Howard Martin*, supra, the trustees brought a collection action in 1979. The Seventh Circuit required deferral to arbitration in July, 1980. As of October 13, 1982, no grievances had been adjudicated. Howard Martin is now involved in bankruptcy proceedings. *S.D.F. Inc., d/b/a Howard Martin* (IP83-1160-B, U.S. Bankruptcy Court, Indianapolis, Indiana, 1983).

[11] **§1145. Delinquent contributions**

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

(Pub. L. 93-406, Title I, ¶ 515, as added Pub. L. 96-364, Title III, § 306(a), Sept. 26, 1980, 94 Stat. 1295.)

gress also designed stringent remedies, including double interest and mandatory attorneys' fees if the trustees prevailed in a collection action (29 U.S.C. § 1132(g)(2)).[12] Significantly, Congress *withdrew* from the Secretary of Labor his power to collect delinquent contributions (29 U.S.C. § 1132(b)(2)),[13] thereby placing the burden entirely on the trustees.

In passing the Amendments Act, Congress was not only concerned with designing more effective means for making employee benefit plans whole; it also expressly sought to streamline and simplify collection actions. In its *Prosser* opinion, the Eighth Circuit drew particular attention to this

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[12] 29 U.S.C. § 1132(g)(2) provides:

§1132. Civil Enforcement

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan —

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of —

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(As amended Pub. L. 96-364, Title III, §306(b), Sept. 26, 1980, 94 Stat. 1295.)

[13] Section 1132(b)(2) provides:

The Secretary shall not initiate an action to enforce section 1145 of this title.

aspect of the Act's legislative history, citing two relevant statements made in or by the Senate and the House of Representatives: "[R]ecourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly." (Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 44, A-13); "Federal pension law must permit trustees of such plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law, other than 29 U.S.C. 186...,"[14] (126 Cong. Rec. 23039 (1980), A-13). Mandatory deferral to arbitration is inconsistent with the legislative history of the MEPPAA. As the Eighth Circuit correctly observed: "issues of arbitrability can be quite complex, and allowing them to be injected into trustee collection suits can frustrate this legislative purpose" (A-13, fn. 4).

Unlike Schneider, who allowed Respondents to conduct an audit and then simply ignored the audit results until a collection action was filed, Prosser resisted a fund audit and then attempted to inject arbitration into this area of trustee activity. The notion that an arbitrator may determine whether the trustees have a right to conduct audits, and, if so, to determine the scope of that audit, is particularly incongruous since audits are routine matters of trust administration,[15] exclusive to trustees under 29 U.S.C. §

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[14] Such issues would include structural violations (for example, unequal representation of labor and management on fund boards of trustees) or a fund's failure to operate pursuant to a written instrument specifying the basis on which contributions are made and monies disbursed. Congress did not contemplate that such defenses as exhaustion could be raised by an employer to delay a collection action initiated by the trustees of trust funds that otherwise comply with the Taft-Hartley Act (29 U.S.C. § 186(c)(5)).

[15] See Bogert, *Trusts and Trustees*, Chap. 46, *Accounting and Compensation* (2d ed. 1975). The trustees' right to determine the scope of an audit and to conduct it was rarely challenged prior to *Central States, et al.* v. *CRST*, supra. When it limited the scope of a trustee initiated audit in *Central States, et al.* v. *Central Transport*, 698 F.2d 802 (6th Cir. 1983), the 6th Circuit cited only *CRST*, as Central States pointed out in their "Petition for a Writ of Certiorari."

1103, and hence far removed from the sphere of bargainable issues likely to be reflected in a collective bargaining agreement which is the *only* agreement open to the arbitrator's interpretation.

There is no authority to suggest that an arbitrator may properly review trustees' interpretations of their own trust instruments with regard to any matter involving *trust administration*. Even the Eighth Circuit panel in *Central States* v. *CRST, supra*, did not suggest that the permissible scope of an audit was an arbitrable issue. Nor, indeed, did the Sixth Circuit in *Central States, Southeast and Southwest Areas Pension Fund, et al.* v. *Central Transport*, 698 F.2d 802 (6th Cir. 1983), to be discussed below. Moreover, such questions as the statute of limitations for audits and the possible estoppel effect of an NLRB decision involving the Union on a subsequent action by fund trustees are peculiarly matters of law to be resolved by courts, not arbitrators. Prosser, of course, believed otherwise (Petition, pp. 7-8).

The possibility that an employer could insist on submitting the audit provision of the Trust Agreements governing the Central States Funds to arbitration raises problems of towering proportion. As *Prosser* notes, the Central States Pension and Health and Welfare Funds are two of the largest Taft-Hartley employee benefit trusts in the United States (Petition, p. 13). Some 12,000 employers with employees in 40 states contribute to the two funds pursuant to thousands of collective bargaining agreements having different grievance mechanisms. The two Trust Agreements are incorporated by reference in these thousands of collective bargaining agreements and are hence made binding on employers and Unions.

Clearly, the Trust Agreements are not ordinary contracts, but are blueprints for the centralized administration of these vast trusts. Indeed, they can only be modified by the Trustees themselves pursuant to a specified amendment

process. Chaos would result if arbitrators throughout the country were permitted to construe the Trust Agreements and substitute their interpretations for those of the Trustees. The Eighth Circuit did not find that arbitration was an appropriate vehicle by which to test the scope of the trustees' administrative authority. Prosser's contentions have no merit and are inconsistent with orderly trust administration as contemplated by ERISA and the MEPPAA.

As a final point, Schneider argues that since Congress provided for the arbitration of disputes concerning withdrawal liability[16] in designing the MEPPAA (Petition, p. 16), the Eighth Circuit opinion is inconsistent with employee benefit law as manifested in *this* statute and is thus in conflict with "the Congressional policy favoring arbitration as a means of resolving disputes in this area." Rep. Frank Thompson, one of MEPPAA's principal sponsors, specifically addressed this point:

> The committees intend *that the role of the arbitrator under this Act will be similar to that of a judge applying applicable law to the facts presented, and not a mediator attempting to reconcile competing interests.* In arbitration proceedings under various labor laws, issues are often compromised, in part so as to avoid damaging ongoing relationships between management and labor. Unlike proceedings of that type, the proceeding contemplated by the committees is intended to resolve disputes, to the extent possible, in favor of one of the parties rather than in favor of compromise. Cong. Rec. H 7899 (House debate of August 26, 1980, emphasis supplied).

In point of fact, arbitration in the context of resolving withdrawal liability disputes mainly involves the application of complex and technical statutory formulae to closed

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[16] An employer's "withdrawal liability" is his share of a pension fund's unfunded vested benefits liability. Unfunded vested benefits liability is the amount by which nonforfeitable benefits exceed fund assets. When an employer withdraws from a multiemployer pension plan, withdrawal liability can be imposed for up to 20 years to fill the funding gap left by his departure (29 U.S.C. § 1381, et seq.).

transactions; it is not part of an ongoing process of collective bargaining; it does not serve to give added content to open-ended collective bargaining agreements; and it does not promote industrial peace, all of which functions earned the approval of this Court in the *Steelworkers Trilogy*. This argument falls of its own weight.

In sum, neither Schneider nor Prosser have produced any authority, controlling or persuasive, showing that mandatory deferral to arbitration is consistent with national pension policy.

4. Mandatory deferral to arbitration is not required by federal labor law.

Both Schneider and Prosser argue, with the dissent, that the majority opinion of the Eighth Circuit threatens to "erode" "pronouncements of the Supreme Court in the Steelworkers Trilogy" (A-20; Prosser Petition, pp. 14-15; Schneider Petition, pp. 6, 12). The *Steelworkers Trilogy*, however, does *not* support the principle of mandatory deferral, as the Eighth Circuit found (A-6/7).

In *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 570-571 (1960), this Court emphasized that arbitration is fundamentally "a creature of contract." That is why courts themselves must determine, as a threshold question, whether or not a particular claim or controversy lies, on its face, within the scope of a particular contract's arbitration clause.

The contractual nature of arbitration was stressed, further, in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960). Here, this Court analyzed labor arbitration as a *method for reducing industrial strife* and characterized the grievance procedure as part of a continuous *process of collective bargaining*: "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." Consonant with *American Manufacturing*, *supra*, the Court cautioned that "a party cannot be required to submit to

arbitration any dispute which he has not agreed so to submit." In other words, "the arbitrator's construction" is something which has to be "bargained for." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

This Court has *never* upheld the principle of mandatory deferral to arbitration. Thus, the Court indicated its willingness to examine a whole contract for evidence of an agreement to arbitrate in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962). And, in *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368 (1974), the Court observed, in essence, that public policy either in *favor* or *disfavor* of arbitration is secondary to *contractual language* as a manifestation of the parties' intent.

A further point to be noted is that binding arbitration has traditionally been accepted as the *quid pro quo* for no-strike clauses. *See Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Boys Markets, Inc.* v. *Retail Clerks' Union, Local 770*, 398 U.S. 235 (1970).

This line of cases makes clear that the Eighth Circuit's decision in no way departs from national labor policy and is perfectly consistent with the teachings of the *Steelworkers Trilogy*.

The Trustees of the Central States Funds are *not* parties to the collective bargaining agreement; rather, they are third-party beneficiaries of the collective bargaining agreement in question. *Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960).[17] Thus, they have never "bargained for" or "ag-

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[17] Petitioners dismiss the Eighth Circuit's application of *Lewis* v. *Benedict*, supra, because of the different fact pattern at issue. However, the Eighth Circuit *clearly distinguished Lewis* v. *Benedict* from *Prosser and Schneider*, but noted, quite correctly: "And while Lewis alone may not be dispositive of Schneider's and Prosser's cases, it does refute their argument that the trustees, as third-party beneficiaries, are subject to the same defenses as could be asserted against a suit by the union." (A-6) While this Court held that fund trustees cannot prevail if the underlying contract is *illegal*, it did not undo the basic proposition established in *Lewis* v. *Benedict*, namely, that benefit fund trustees are unusual third-party beneficiaries and not subject to ordinary third-party beneficiary law. *See Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982).

reed" to abide by an arbitrator's construction of the collective bargaining agreement, let alone an arbitrator's construction of the Trust Agreements from which their contractual powers derive. Finally, as this Court made unambiguously clear in *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), employee benefit fund trustees stand *completely outside* of the collective bargaining process and are not the "representatives" of the labor and management groups that appoint them. Thus, mandatory deferral will have no effect on stabilizing industrial relations or serve any of the other purposes delineated in the *Steelworkers Trilogy*.

Both Petitioners nevertheless express concern that, absent mandatory deferral, employers will be caught between two tribunals, and may be subject to differing interpretations of the same collective bargaining agreement, which will prejudice labor relations (Schneider Petition, pp. 12-14; Prosser Petition, pp. 13-15). This contingency is remote. Given the cost of arbitration (as the Eighth Circuit noted), it is unlikely that a Union would file a grievance on behalf of a fringe benefit fund when that fund has itself already filed suit in federal court. Conversely, if the Union has filed grievances expeditiously, the Trustees might well await a decision concerning "coverage under the collective bargaining agreement" before filing a collection action involving the *same* controversy.[18] (Schneider's concern is also somewhat disingenuous, considering the fact that *it* never even tried to reconcile disputed questions of coverage with the Union. Rather, a year and a half after it received the results of a fund audit, and ignored them, it filed a Motion to Dismiss the Trustees' claim for delinquent contributions on the grounds that the Trustees had failed to exhaust the intracontractual grievance/arbitration mechanism!)

Moreover, employers would not necessarily be subject to differing interpretations of the same collective bargaining

[18] The trustees would still be subject to a nondelegable duty to collect contributions. Thus, the decision to await an arbitration award would involve a consideration of all relevant facts and circumstances, including the risk of delay.

agreement should they become involved in proceedings in two forums. As the Eighth Circuit noted, there is nothing preventing courts from carefully considering the interpretations of an arbitrator (A-19); nor would an arbitrator be prevented from weighing the constructions of a court.

It cannot be overemphasized that the issue sought to be reviewed is whether Trustees can be *compelled to proceed to arbitration absent any contractual basis for mandatory deferral*. To prevent the possibility of having to litigate in two forums, parties to collective bargaining agreements could grant the trustees *direct* access to contractual grievance mechanisms and make arbitration a condition precedent to litigation *if* bona fide coverage questions are involved. This would at least release the Trustees from enforced reliance on the Union.[19]

Schneider notes that the Eighth Circuit's opinion would prevent the Union from ever becoming a party to a trustee collection action (Petition, p. 13). There is no authority to suggest that the exhaustion doctrine would prevent a Union from intervening in a trustee collection action to protect its own interests. This argument has no merit.

As a final point, Schneider argues that the Eighth Circuit decision conflicts with established labor law because Section 302(c)(5) of the LMRA provides for the selection (or court appointment) of a neutral arbitrator to break a trustee deadlock. This argument, too, falls of its own weight. Clearly, the arbitrator's role here is to free the Trustees from paralysis and ensure that they *will act*.

In sum, neither Schneider nor Prosser have shown that mandatory deferral to arbitration of trustee-initiated lawsuits is required by federal labor law or the *Steelworkers Trilogy*.

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[19] If the arbitration proceeding were in any way defective, fund trustees would claim the right to *de novo* judicial adjudication on the grounds that statutory rights and obligations are involved. *See Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981).

5. To the extent a conflict exists in the circuits, it is insubstantial.

Prosser and Schneider argue that review by this Court is necessary to resolve a conflict in the circuits. Respondents have already indicated that this conflict is insubstantial, at best, in light of recent decisions of this Court. Nevertheless, Respondents feel constrained to address the "conflicting" cases raised in opposition to the Eighth Circuit's decision: *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin*, 625 F.2d 171 (7th Cir. 1980); *Trustees of the National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Health Center*, 669 F.2d 212 (4th Cir. 1982); and *Central States, Southeast and Southwest Areas Pension Fund, et al.* v. *Central Transport*, 698 F.2d 802 (6th Cir. 1983).

Howard Martin; supra, is the only case in direct conflict with the case at bar. As noted above, this decision is not good law for a variety of reasons and was not followed by the Fifth Circuit in *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983), the first circuit court that had the opportunity of choosing between the approaches taken by the Seventh and the Eighth Circuits.

While the Fourth Circuit in *Constant Care, supra*, did adopt the *Howard Martin* approach in theory, it did not apply it in practice, having determined that the facts before it were "simple" and did not warrant arbitration. Thus, the court refused to dismiss a trustee collection action for failure to exhaust the grievance mechanism of the collective bargaining agreement. Such conflict as exists by virtue of the *Constant Care* decision exists by virtue of dictum and does not justify a review by this Court.

Central States v. *Central Transport, supra*, has nothing to do with mandatory deferral to arbitration. In this case, the Sixth Circuit found that the Trustees of the Central States Funds, when conducting audits, could inspect the records only of those employees the employer conceded

were covered by the collective bargaining agreement unless *the Trustees* had reasonable cause to believe that particular employees were improperly omitted from the bargaining unit and might be entitled to contributions. The court never suggested that an arbitrator could determine the permissible scope of a trustee audit.

Central Transport was decided on January 20, 1983, and the decision was available to the Eighth Circuit before it decided the case at bar on February 16, 1983 (*see* A-23, fn. 7). The Eighth Circuit specifically chose not to follow the Sixth Circuit. (Central States has filed a Petition for a Writ of Certiorari to the Sixth Circuit.)

Ironically, Schneider includes in its Petition (p. 9) the following passage from *Central Transport* in support of its contention that matters of coverage under a collective bargaining agreement must be decided by contractual grievance mechanisms no matter in what context the controversy arises:

> Entitlement to Funds' benefits may be established by a concession amongst the parties that a particular individual is a covered employee or person otherwise entitled to the Funds' benefits. Entitlement may also be established by the judicial or arbitral process where there is no concession that an employee, or one claiming under him or her, is a covered employee.

Schneider omits the citation chosen by the Sixth Circuit to immediately follow this statement: *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728 (1981). In *Barrentine*, this Court found that *collective* bargaining with its spirit of compromise and the duty of fair representation under the LMRA were not necessarily consistent with the vindication of *individual statutory rights*.[20] As the Eighth

[20] In *Barrentine*, this Court held that employees could go to court to vindicate their entitlement to compensation under the Fair Labor Standards Act although a parallel contractual wage claim had been adversely decided by an arbitrator.

Circuit noted: "Although Barrentine involved a different right from those under consideration here, it at least shows that the presumption in favor of arbitration is not, of itself, sufficient to place statutory rights or obligations, such as those imposed on trustees and employers by ERISA and MEPPAA, under the arbitral process. Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII cause of action not subject to arbitration" (A-15). To which Respondents add: the trustees, in conducting audits and filing collection actions, are exercising statutory fiduciary powers to protect the interests of participants and beneficiaries who *also* have statutory rights which Congress sought to protect.

In sum, neither Prosser nor Schneider have shown that a substantial conflict exists in the circuits justifying review by this Court. On the contrary, only one case, *Howard Martin*, is in *direct* conflict with the Eighth Circuit decision. However, the court's reasoning in *Howard Martin* is not only inconsistent with important principles articulated by this Court in subsequent related decisions; it also conflicts with the rationales of two leading Third Circuit cases mandating trustee independence: *Nedd* v. *United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977) and *Rosen* v. *Hotel and Restaurant Employees, Local 274*, 637 F.2d 592 (3d Cir. 1981).

CONCLUSION

Mandatory deferral to arbitration of actions brought by benefit fund trustees, whether to collect delinquent contributions or to compel audits of contributing employers' records, is inconsistent with the principle of trustee independence as articulated by this Court and by the courts of various circuits. It is also inconsistent with national pension policy as formulated by Congress in ERISA and the MEPPAA. Established labor law does not require fund trustees to exhaust contractual grievance mechanisms which they did not bargain for *and* to which they do not have direct access. The concerns raised by Prosser and Schneider with regard to the possibility of litigating in two tribunals can be eliminated by negotiating changes in the collective bargaining agreement. To the extent a conflict in the circuits exists, it is insubstantial and will be resolved as a majority view clearly emerges, based on the Eighth Circuit's thoughtful and comprehensive decision. For all of the above reasons, Writs of Certiorari should not be issued and review should be denied.

Respectfully submitted,

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Nos. 82-1860 and 82-1862

In The

Supreme Court of the United States

October Term, 1983

SCHNEIDER MOVING & STORAGE COMPANY,
Petitioner,

and

PROSSER'S MOVING AND STORAGE COMPANY,
Petitioner,

vs.

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States, Southeast and Southwest Areas Pension Fund, a pension trust,
Respondents.

and

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States, Southeast and Southwest Areas Health and Welfare Fund, a health and welfare trust,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER SCHNEIDER MOVING AND STORAGE COMPANY'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

May trustees of multiemployer health and welfare and pension funds, which are created and receive contributions as third-party beneficiaries of collective bargaining agreements between employers and labor unions under Section 302 (c) of the Taft-Hartley Act (29 U. S. C. § 186 (c)), bypass the union and the contractual grievance and arbitration procedure by suing an employer for allegedly delinquent contributions directly in federal court, where the determination of liability requires the interpretation and construction of the collective bargaining agreement in order to resolve issues relating to which employees are covered by the employer's obligation to contribute?

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Argument:

I. Two important federal labor policies require that issues as to which employees are covered by an employer's obligation under a collective bargaining agreement to contribute to Taft-Hartley Act multiemployer employee benefit funds and which involve the construction and interpretation of the terms of the agreement, must be raised and resolved through the grievance and arbitration procedure of the agreement. 13

A. Collective bargaining, including the use of contractual arbitration procedures to resolve disputes over construction, interpretation, and application of agreements, is to be encouraged. 13

B. Trustees shall be independent of union and employer influence in the administration of Taft-Hartley multiemployer employee benefit trust funds. 25

II. As third party beneficiaries of the collective bargaining agreement, the Trustees' rights to receive contributions can be no greater than are provided in the agreement. 31

III. The majority of the Courts of Appeals that have reviewed this issue have concluded that coverage issues must first be submitted to the grievance and arbitration procedure under the terms of the collective bargaining agreement. 39

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Nos. 82-1860 and 82-1862

In The

Supreme Court of the United States

October Term, 1983

SCHNEIDER MOVING & STORAGE COMPANY,
Petitioner,

and

PROSSER'S MOVING AND STORAGE COMPANY,
Petitioner,

vs.

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States, Southeast and Southwest Areas Pension Fund, a pension trust,
Respondents.

and

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States, Southeast and Southwest Areas Health and Welfare Fund, a health and welfare trust,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER SCHNEIDER MOVING AND STORAGE COMPANY'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 700 F. 2d 433 (8th Cir. *en banc* 1983) and is set forth in the Appendix to Schneider's Petition for Writ at A-20. The opinion of a

panel of the Court of Appeals for the Eighth Circuit was withdrawn when the request for a rehearing *en banc* was granted. The slip opinion is set forth in the Appendix to Schneider's Petition for Writ at A-7. The Memorandum and Order of the District Court for the Eastern District of Missouri was unreported and is reproduced in the Appendix to Schneider's Petition for Writ at A-1 to A-6.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit, *en banc,* was entered on February 16, 1983. The Petition for Certiorari was timely filed with this Court on May 17, 1983. On October 3, 1983, the Petition for Certiorari was granted. A Petition for Certiorari filed in the case of *Prosser's Moving and Storage Company v. Robbins, et al.,* No. 82-1862, was also granted on October 3, 1983, and the two cases were consolidated. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

STATUTES INVOLVED

This case involves §§ 9 and 302(c) (5) of the Labor-Management Relations Act (29 U. S. C. §§ 159 and 186(c) (5) (1976)) and §§ 404(a) and 515 of the Employee Retirement Income Security Act of 1974 (29 U. S. C. §§ 1104 (a) and 1145). These statutory provisions are set forth in Appendix A to this Brief on the Merits.

STATEMENT OF THE CASE

A. Collective Bargaining and Multiemployer Funds

The Respondents are Trustees of two multiemployer employee benefit funds—a health and welfare fund and

a pension fund[1]—which receive contributions solely from employers. No employees contribute. The amount of the employers' contributions is determined by agreement reached through collective bargaining. Employers, such as Petitioner Schneider, contract with Teamsters local unions representing their employees to contribute to the funds a specified number of dollars per unit of employee labor covered by the collective bargaining agreement. The collective bargaining agreements usually provide no particular level of benefits. Benefits are determined solely by the trustees of the pension or health and welfare fund, as the case may be. The Respondents' trust agreement expressly bars any employer involvement in the administration of the fund, other than as a contributor. Further, there is no direct correlation between the level of contributions established by a collective bargaining agreement on the one hand, and, on the other, the level of benefits set by the Respondents as trustees of the funds.

The level at which, and the categories of work for which, a particular employer contributes to the funds for its covered employees is established by collective bargaining between the employer and the Teamsters local union representing those employees. *See,* Schneider Pet. App. A-43. The trustees have no direct control over the dollar level of contributions established. Similarly, the employer has no control over what benefits the fund and its trustees may establish, and the rules under which those benefits accrue to any employee fund beneficiaries. All of these matters are determined solely by the trustees.

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[1]Central States, Southeast, and Southwest Areas Health and Welfare Fund and Central States, Southeast, and Southwest Areas Pension Fund.

B. The Allegations in This Case

This matter involves a suit filed on April 21, 1980, by the Respondents as Trustees of the Central States Health and Welfare Fund and as Trustees of the Central States Pension Fund (hereinafter collectively referred to as either "Trustees" or "Funds"), against the Petitioner, Schneider Moving & Storage Company (hereinafter "Schneider"), in the United States District Court for the Eastern District of Missouri.

The complaint alleged that:

(1) Schneider had been a party to a series of three collective bargaining agreements from 1970 to 1979, with Teamsters Local 610, (J. A. 6, para. 6, 7 and 8);

(2) Each of the agreements was the "Master Agreement for Public Movers of the Greater St. Louis and St. Louis County areas of Missouri," (J. A. 6, para. 6, 7, and 8);

(3) The agreements provided for "specific payments to the Health and Welfare Fund *for each employee covered by said Agreement,*" (emphasis added) (J. A. 6 para. 6, 7 and 8);

(4) "By virtue of provisions contained in the Collective Bargaining Agreements to which Defendant was bound, Defendant did promise and become obligated to make contributions, *in amounts set forth therein,* to said Pension and Health and Welfare Funds on behalf of its employees for each hour worked or for which wages were received by such employees," (emphasis added) (J. A. 7, para. 10);

(5) The failure to make the contributions as required constituted a violation of the collective bargaining agreements, (J. A. 8, para. 8);

(6) Under the terms of the collective bargaining agreements and the Trust Agreements the Trustees were authorized to audit Schneider's payroll records

to determine compliance with the obligation to contribute "as required under the applicable Collective Bargaining Agreement," (J. A. 8-9; para. 11);

(7) Schneider had refused to permit the Trustees to audit and had failed to make the required payments, (J. A. 9; para. 12); and[2]

(8) As a result of such alleged "omissions and breaches of Agreement" the Trustees might have "to deny the employee-beneficiaries of such fund, for whom required contributions have not been made, the benefits provided thereunder. . . .," (J. A. 9; para. 13);

The Trustees prayed, *inter alia,*

"1. That an account be taken as to *all employees* of Defendant *covered by the Collective Bargaining Agreement,* as to wages received and hours worked by such employees to determine amounts required to be paid to the Trustees . . . covering the periods for which the collective bargaining agreements are effective," (emphasis added) (J. A. 10); and

2. That Schneider be ordered to pay to the Trustees all amounts due. (J. A. 10-11).

C. The Exhibits to the Complaint

Attached to the Trustees' Complaint were the following exhibits which were incorporated by reference.

Exhibit 1—Master Agreement for Public Movers of the Greater Metropolitan St. Louis and St. Louis County Areas of Missouri for the period March 1, 1970, through February 20, 1973, with Local Union No. 610.

Exhibit 2—Master Agreement for Public Movers of the Greater Metropolitan St. Louis and St. Louis County Areas of Missouri for the period

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[2]As the Court below noted, Schneider had consented to an audit and did not raise the issue of the right to audit. The only issue raised by Schneider relates to how the coverage issue is to be handled. 700 F. 2d 433, 436; (Schneider Pet. App. A-22).

March 1, 1973, through February 28, 1976, with Local Union No. 610.

Exhibit 3—Master Agreement for Public Movers of the Greater Metropolitan St. Louis and St. Louis County Areas of Missouri for the period March 1, 1976, through February 28, 1979, with Local Union No. 610. (Schneider Pet. App. A-43).

Exhibit 4—Pension Trust Agreement. (J. A. 14)

Exhibit 5—Pension Plan

Exhibit 6—Health and Welfare Trust Agreement

Exhibit 7—Joint Application

Exhibit 8—Participation Agreement

D. The Collective Bargaining Agreements

Exhibit 3, the Master Agreement for Public Movers of the Greater Metropolitan St. Louis and St. Louis County Areas of Missouri for the period March 1, 1976, through February 28, 1979, is set forth in full in Schneider's Petition (Schneider Pet. App. A-43-76) and is also representative of the 1970-73 and 73-76 collective bargaining agreements (Complaint Exhibits 1 and 2), except as indicated below with respect to Section 12.2. (*See,* J. A. 12-14.)

The three collective bargaining agreements categorized employees covered by the agreements on the basis of their tenure. They are referred to as either "regular" or something else, i. e., extras, temporary, part-time, casuals, and seasonal. Employees are further classified for purposes of benefit entitlement based upon their length of time within a particular tenure class. The collective bargaining agreements provide different benefits for employees depending on their tenure status. Appendix B summar-

izes the categorization of different groups of employees depending on the status of their tenure.

E. The Plan Documents

As stated above, the Trustees attached several plan documents to their complaint, including the Pension Trust Agreement, excerpts of which are included in the Joint Appendix. (J. A. 14-33.) The other documents were omitted from the Joint Appendix. The allegations in the Complaint relating to those exhibits are that those documents, along with the collective bargaining agreements provide:

> (1) That the "Trustees . . . are required to receive, hold and manage all monies required to be contributed to the [Fund] in accordance with the provisions of the then applicable Collective Bargaining Agreement, as a Trust Fund, for the uses and purposes set forth in the Agreement and Pension Trust Agreement and Welfare Trust Agreements governing the Fund to which the contributions are made," (J. A. 7; para. 9); and
>
> (2) That the Trustees have the right to audit. (J.A. 8; para. 11).

F. The Proceedings Below

Petitioner Schneider answered the Complaint on June 5, 1980. (J. A. 34-37). On October 20, 1980, Schneider moved to dismiss the Complaint on the grounds that the claims involved underlying issues of coverage[3] which had

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[3]Here the issue is framed by reference to which employees are covered by Schneider's obligation to contribute, based on their categorization by tenure as "regular" or something else. Obviously the issue could also arise where employees are covered or not covered by job classification. The issue of coverage also arises when an employer has contracts with unions which have overlapping jurisdiction, such as is typical in the construction industry, and different fringe benefit funds claim the employer was obligated to make contributions on behalf of the same employees.

to be raised and resolved through the grievance and arbitration procedure set forth in Article VI of the collective bargaining agreements attached to the Complaint as Exhibits 1, 2, and 3. (Schneider Pet. App. A-43, at A-51-53). In support of the Motion to Dismiss Schneider offered the affidavit of Marvin Schneider, Vice-President of Petitioner. (J. A. 38). In his affidavit M. Schneider states that Schneider employs two types of non-supervisory employees—regulars and extras; that only regulars have ever been considered entitled under the collective bargaining agreements to fringe benefits such as seniority, holidays, vacations, and other benefits; that such is typical of the industry; and that an audit by the Trustees had resulted in claimed deficiencies to the Welfare Fund of $12,303.50 and to the Pension Fund of $12,610.50; and that the largest part of the alleged deficiencies was for "extras." Amounts were also claimed for employees Schneider believed to be supervisory or otherwise excluded from the bargaining unit. (J. A. 38-40). The Trustees offered no counter-affidavits or evidence.

On November 7, 1980, the Honorable John K. Regan, United States District Judge for the Eastern District of Missouri, dismissed the Complaint. Judge Regan, relying on the then recent decision of the Court of Appeals for the Seventh Circuit in *Central States, Southeast and Southwest Areas Pension Fund v. Howard Martin, Inc.*, 625 F. 2d 171 (7th Cir. 1980), ruled that this was ***not a simple collection*** case, but instead that Schneider's ultimate liability depended upon a construction and interpretation of the collective bargaining agreement. Judge Regan accordingly held that such controveries must first be submitted to arbitration. (Schneider Pet. App. A-1-6).

The Trustees appealed the decision of the District Court to the United States Court of Appeals for the Eighth Circuit. On March 24, 1982, the Court of Appeals reversed the decision of the District Court and remanded the case for further proceedings. (Schneider Pet. App. A-7 and Prosser's Pet. App. A-27).

On April 7, 1982, Schneider and Prosser each filed separate Petitions for Rehearing *en banc* in the United States Court of Appeals for the Eighth Circuit. The Court of Appeals granted both Schneider's and Prosser's Petition for Rehearing *en banc.* (Prosser's Pet. App. A-26).

On February 16, 1983, in a six to two decision, the Eighth Circuit Court of Appeals, while noting a conflict among the Circuit Courts of Appeals, reversed the District Court and overruled several prior decisions of the Eighth Circuit and remanded the case for further proceedings. 700 F. 2d 433; (Schneider Pet. App. A-21 and Prosser's Pet. App. A-1). The Court *en banc,* in an opinion by Judge Arnold, joined by Lay, Chief Judge, Heaney, Bright, Ross and McMilliam, ruled that national pension policy dictates that "these trustees are not bound by the arbitration procedure, which they have no right to initiate." 700 F. 2d 433, 435; (Schneider Pet. App. A-21-22). The Court below further concluded that under *Lewis v. Benedict Coal Corporation,* 361 U. S. 459 (1960), the Trustees are not subject to the arbitration procedure as third party beneficiaries. 700 F. 2d 433, 436; (Schneider Pet. App. A-24-25). Further, the Court held that the national labor policy favoring arbitration of collective bargaining disputes must give way to the right of trustees to administer Taft-Hartley funds free of union interference and

this requires that they have a direct right of access to the courts. 700 F. 2d 433, 439-442; (Schneider Pet. App. A-29-37).

Senior Circuit Judge Henley, joined by Circuit Judge John R. Gibson, dissented, stating:

> Today the court makes bad law. (footnote omitted). It unnecessarily overrules three prior decisions of this court, rejects the reasoning of the Seventh Circuit in *Martin* and erodes pronouncements of the Supreme Court in the *Steelworkers Trilogy*. Its decision may be perceived as doing disservice to the national policies of maintaining industrial peace, avoiding delay and deferring to the expertise of persons acquainted with industry standards and the law of the shop.

700 F. 2d 433, 443; (Schneider Pet. App. A-38-39).

SUMMARY OF ARGUMENT

Congress and this Court have emphatically declared that it shall be the federal labor policy to encourage collective bargaining, including the use of contractual arbitration procedures to resolve disputes over the construction, interpretation and application of collective bargaining agreements, and that trustees of Taft-Hartley multiemployer employee benefit trust funds shall discharge their fiduciary duties independently of the unions and employers that appoint them and for the exclusive benefit of the participants and beneficiaries of the trusts. In this case the Trustees of the Central States and Southeast and Southwest Areas Pension Fund and Health and

Welfare Fund have filed an action in federal district court alleging that Schneider had failed to make contributions to the Funds on account of the employment of certain employees as agreed in a series of collective bargaining agreements. An examination of the collective bargaining agreements reveals that Schneider and the union had, pursuant to the performance of the bargaining obligation, lawfully intended to provide for contributions on account of employment of only certain classes of employees, excluding others. However, due to patent ambiguities in the wording of the contracts, a question exists as to which employees are covered by the obligation to contribute and which are not.

Federal labor policy requires that coverage issues be raised and resolved under the procedures provided by the collective bargaining agreement as a condition precedent to the Trustees claiming that they have a right to receive contributions for the employees in question. The resolution of coverage issues does not involve trust administration under Section 302(c)(5) of the Labor Management Relations Act or under Section 404(a) of ERISA. Therefore, the Trustees have no obligation to resolve coverage issues outside the provisions of the collective bargaining agreement.

The position asserted by the Trustees seriously erodes the federal policy of encouraging collective bargaining and the resolution of disputes through the arbitration procedure which was agreed to under the collective bargaining agreement, and also jeopardizes the federal policy of trustee independence in the administration of such funds.

Further, because the funds are third party beneficiaries of the collective bargaining relationship, their rights can be no greater than those which are determined in accordance with the collective bargaining process. The Trustees must await a determination reached through that process. If resolution of disputes through a grievance and arbitration procedure is part of that process, then the Trustees must await the outcome of that procedure. While the outcome of that procedure may or may not concur with the Trustees' position on coverage, they are bound by the outcome just as they, the union, and Schneider, are bound by the terms of the collective bargaining agreement which establishes the rights of the Trustees to receive contributions.

A decision by the union not to pursue the coverage issue through the contractual grievance and arbitration procedure should be judged by the standard applicable to the duty of fair representation. It is under that standard that the contribution obligation is negotiated in the first instance. This would adequately assure that the union will be reasonably diligent in investigating and resolving the coverage issue.

The requirement that coverage issues be resolved through the contractually agreed upon grievance and arbitration procedure has support in the sound reasoning of the Courts of Appeals for the Fourth, Sixth, Seventh, and Ninth Circuits, and in rulings of panels of the Eighth Circuit Court of Appeals which preceded the ruling of the Court below.

———o———

ARGUMENT

I. Two important federal labor policies require that issues as to which employees are covered by an employer's obligation under a collective bargaining agreement to contribute to Taft-Hartley Act multiemployer employee benefit funds and which involve the construction and interpretation of the terms of the agreement, must be raised and resolved through the grievance and arbitration procedure of the agreement.

The Court below viewed this case as involving an apparent conflict between two federal policies:

> 1. Collective bargaining, including use of collectively bargained for arbitration procedures to resolve disputes over the construction and interpretation of collective bargaining agreements, is to be encouraged; and
>
> 2. Trustees shall be independent of union and employer influence in the administration of Taft-Hartley multiemployer employee benefit trust funds.

700 F. 2d 433, 437; (Schneider Pet. App. A-25-26).

This apparent conflict is imaginary. Both policies can be, and should be, stressed. These policies do not exist in a vacuum. Each is a function of the other. The position being asserted by Schneider allows for the harmonious accommodation of both of these policies; the position being asserted by the Trustees and which was adopted by the Court below, threatens to erode not one, but both of these policies, and is incompatible with the rationales underlying those policies.

A. Collective bargaining, including the use of contractual arbitration procedures to resolve disputes over construction, interpretation, and application of agreements, is to be encouraged.

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by *encouraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, *for the purpose of negotiating the terms and conditions* of their employment or other mutual aid or protection. (emphasis added).

Wagner Act, 29 U. S. C. § 151 (1976).

Arbitration pursuant to contractually agreed upon procedures is favored as the means of resolving labor disputes.[4]

The Trustees argued in the courts below that this policy has no application to them or disputes of this type because:

> (1) Coverage issues are not the types of disputes that are suitable for resolution under the contractual grievance and arbitration procedure;
>
> (2) The Trustees are not parties to the collective bargaining agreement;
>
> (3) The Trustees' fiduciary duties would be compromised by having to depend on the union to enforce their perceived rights; and
>
> (4) The Trustees cannot be forced to arbitrate issues of trust administration—which is how they characterize the collection of alleged delinquencies.

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[4] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Gateway Coal Co. v. U.M.W.*, 414 U.S. 368 (1974). *See also, Collyer Insulated Wire*, 192 NLRB 837 (1971); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

The position of the Trustees and the opinion of the Court below substantially undermines the status of a local union as the statutory exclusive bargaining representative of an employer's employees. *National Labor Relations Act* § 9(a), 29 U. S. C. § 159(a) (1976). This status as exclusive representative is a fundamental tenet and central element of the Congressional structuring of industrial relations in this country. *Abood v. Detroit Board of Education,* 431 U. S. 209, 220 (1977). The status of exclusive representative is presumed to be the basis of a union's underlying strength. *Id.*

As the exclusive collective bargaining representative, the local union engages in negotiations with employers such as Schneider which lead to agreements which are reduced to writing. *NLRA,* § 8(d), 29 U. S. C. § 158(d) (1976).

The National Labor Relations Act defines the obligation to bargain as including the conferring "in good faith with respect to wages, hours, and other conditions of employment, or the negotiation of an agreement or any question arising thereunder . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." *NLRA,* §§ 8(a) (5), (b) (3) and (d); 29 U. S. C. §§ 158(a) (5), 158(b) (3), and 158(d). The NLRA has been interpreted to require the employer to bargain with the union regarding pension plans and health and welfare plans. *Inland Steel Co. v. NLRB,* 170 F. 2d 247 (7th Cir. 1948); *cert. den.* 336 U. S. 960 (1949); *W. W. Cross & Co. v. NLRB,* 174 F. 2d 875 (1st Cir. 1949); *See also, Sheet Metal Workers (Central Florida Sheet Metal Contractors Association, Inc.),* 234 NLRB 1238 (1978). In fact, the National Labor Relations Board is of the opinion that even during the term of a

collective bargaining agreement, the subject of who is covered by an obligation to make contributions to a multi-employer employee benefit fund is a mandatory subject of bargaining. *International Union of Operating Engineers, Local Union No. 12 (Maas & Feduska, Inc.)*, 234 NLRB 1256 (1978), *rev'd sub nom. Maas & Feduska, Inc. v. NLRB*, 632 F. 2d 714 (9th Cir. 1979).

Maas & Feduska reflects an attitude that since it is their members who are the participants in and beneficiaries of the benefit funds, it is the duty of local unions, as the collective bargaining representative, to protect the funds from employers who fail to make contractually agreed-upon contributions.

While representing the employees of an employer in collective bargaining, a union has full freedom to bargain to the greatest good of the greatest number. Consequently, individual interests are at times subordinated to the interests of the group. It is uniformly recognized that the union must be afforded a broad range of discretion to resolve conflicts of interest within its ranks. *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1953).[5] *See* Comment,

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[5]In *Huffman*, the Court upheld the validity of an agreement between Ford Motor Company and the UAW which afforded seniority credit for military service to veterans who had not worked for the company prior to their military service in World War II. The court explained:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed as statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose and the exercise of its discretion.

Ford Motor Co. v. Huffman, 345 U. S. 330, 338 (1953).

The Duty of Fair Representation: The Emerging Standard of the Union's Duty in the Context of Negligent, Arbitrary, or Perfunctory Grievance Administration, 46 Mo. L. Rev. 142 (1981).

The union is of course obligated to discharge its responsibility as the exclusive bargaining representative fairly and in good faith. *Vaca v. Sipes,* 386 U. S. 171 (1967).

To allow the trustees of funds to attempt to override what a union and employer have agreed upon as a mutual accommodation of each other's desires and needs—and with due consideration to the ultimate threat of a strike or lockout—would be to seriously erode the entire concept of collective bargaining.

The Court below was fearful that if the coverage issue was left in the hands of the union, some unspecified obligations of the Trustees would be compromised:

> The union may be inclined to trade off a potential pension fund claim against some other bone of contention in its relations with the employer. Any such decision may be completely legitimate.

700 F. 2d 433, 442; (Schneider Pet. App. at A-36).

This expressed fear completely ignores the effect of the legitimate process of collective bargaining. This process has recently been approved by this Court in *United Mine Workers of America Health and Retirement Funds v. Robinson,* 455 U. S. 562 (1982). *Robinson* is directly on point because it involved a question of whether the negotiation and allocation of benefits in a collective bargaining agreement (as distinguished

from negotiation of contribution obligations) were subject to a standard of reasonableness under § 302(c)(5). Here the Court is concerned with a collective bargaining agreement between Schneider and the Trustees which provides that Schneider will make contributions to the Funds on account of the work performed by certain employees and not on account of the work performed by other employees, depending upon the tenure of those employees, i.e., whether they are regular, part-time, casual, extra, etc. (*See,* Appendix B.) By thus having rejected the contention that there is an implied standard of reasonableness under § 302(c)(5), this Court lends support to the rationale that the agreement between Schneider and the union regarding the classes of employees for which Schneider would make contributions ought to be honored. Now, however, the Trustees have raised a question as to whether Schneider has made contributions on account of certain employees as agreed. Apparently the union does not agree with the Trustees or, at least, it has not yet raised the issue. Thus, Schneider and the union seem to be in agreement. Nevertheless, notwithstanding that apparent agreement, the Trustees now assert that they have the right to ask a federal court to upset the agreement between Schneider and the union, to ignore the intent of the parties, and to ignore the procedure Schneider and the union agreed upon for resolving such disputes.[6] This Court has said that this is not the role of the federal courts.

> There is no general requirement that the complex schedule of the various employee benefits [within the

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[6]The union was not joined as either a party plaintiff or defendant in the proceedings below.

> collective bargaining agreement] must withstand judicial review under an undefined standard of reasonableness.
>
> • • •
>
> [W]hen neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract.

U.M.W.A. Health and Retirement Funds v. Robinson, 455 U.S. 562, 575-6.

The Court below also worried that the union would not diligently pursue resolution of the coverage issue at the request of the Trustees. 700 F.2d 433, 441-2; (Schneider Pet. App. A-35-37). It is respectfully submitted that should the Trustees encounter resistance on the part of the local union to process the coverage issue under the collective bargaining agreement, the Trustees would have an action similar to an individual employee's action for breach of the duty of fair representation. *See, Smith v. Evening News Association,* 371 U.S. 195 (1962), where the Court provided this procedural vehicle for the individual employee to obtain redress if his union fails to represent him fairly.

Later, in *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965), the Court ruled that before an employee may file a suit for breach of the duty of fair representation, the employee must exhaust the contractual grievance procedures through the union. If individual employees fail to take advantage of the grievance and arbitration procedure, they will not be permitted to bring an action in court, unless the contract specifically states that its procedures are not the sole means of remedying grievances. As Mr. Justice Harlan observed for the Court: "It cannot be said, in the normal situation, that contract griev-

ance procedures are inadequate to protect the interest of an aggrieved employee until the employee has attempted to implement the procedures and found them so." 379 U.S. 650, 653. This same principal is applicable to the situation now before the Court. There is no legal or factual basis for presuming that the local union will not in good faith process a request by the Trustees to investigate and resolve the coverage issues. While it may be that the local union will determine that there is no coverage issue because Schneider fully performed as it had agreed under the terms of the collective bargaining agreement, this is what is contemplated by collective bargaining.[7] (*See, Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).)

The Seventh Circuit addressed this perceived problem in *Central States, Southeast and Southwest Areas Pension Fund v. Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980). The court reasoned that:

> Lastly, the funds say they have no access to the arbitration process because Article 7 of the contract provides that arbitration may be invoked "only by the authorized Union representative or by the employer." The argument falls of its own weight, however. To trigger the arbitration process, the Funds need only inform the Union, the members of which the Funds exist to serve, that Martin disputes the coverage of certain workers and asks the Union, the organization of primary interest, to file a grievance against Martin.

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[7]The Court below correctly noted that the Schneider employees voted to decertify the local union in a National Labor Relations Board election in February of 1979. 700 F. 2d 433, 436 (Schneider Pet. App. A-23). The fear that this means there would be no basis upon which to resolve the coverage issue through the grievance and arbitration procedure is unfounded. *See, Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243 (1977).

Id., 625 F.2d 171, 173. A panel of the Eighth Circuit in *Central States, Southeast and Southwest Areas Pension Fund v. CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981), had previously noted that:

> [I]t would appear that in the event a dispute should arise respecting coverage, the duty of fair representation would impel the Union to invoke the grievance machinery if the Funds were to request such action.

641 F.2d 616, 618. As suggested by Judge Henley in his dissent in the decision below and as stated by Mr. Justice Harlan in *Republic Steel v. Maddox*, the courts should not presume a violation of the duty of fair representation.

> Rather, [the courts] should reject hypothetical and unlikely threats to the independence of the Trustees and require the parties first to resort to arbitration, where the law of the shop and the terms of the collective-bargaining agreements may best be interpreted. One need not be clairvoyant to forsee that the spirit of negotiation and compromise that forms the basis for such agreements might be seriously compromised if the parties become aware that the terms of the agreements might be safely ignored or interpreted initially other than through [sic] the arbitration machinery.

700 F. 2d 433, 444; (Schneider Pet. App. at A-41-A-42).

This Court has condemned other attempts to undermine the collective bargaining process and the principal of exclusivity by attempting to circumvent the elected representative. *Emporium and Western Addition Community Organization*, 420 U.S. 50 (1975).

With regard to the issue of whether contribution coverage disputes are amenable to resolution through the

grievance and arbitration procedure, courts, as well as arbitrators, have consistently found such disputes to be arbitrable.[8]

The coverage issue arises because of the imprecise wording in the collective bargaining agreement. See Appendix B which summarizes the haphazard manner of defining Schneider's obligations with respect to "fringe benefits" for its employees, depending on the status of their tenure. While it is clearly not the obligation of this Court to resolve the coverage issue, a review of the contract language reveals that this is an issue for an arbitrator, not a federal court. Among other things, while Sec. 1.2 purports to define "Employee" it, in fact, does

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[8]*Cf. Landy Packing Company v. Amalgamated Meatcutters and Food Handlers of North America, AFL-CIO, District Local 653-653-A,* 627 F. 2d 881 (8th Cir. 1980), *aff'g.* 471 F. Supp. 1218, (D.C. Minn. 1980) (involving enforcement of an arbitration award upholding the union's grievance claiming that the employer had failed to make contractually agreed upon contributions on account of work performed by "casual construction" employees, over the employer's contention that work performed by such employees was not covered by the obligation to contribute); *International Union of United Automobile, Aerospace and Agricultural Implement Workers of America v. F. Systems, Inc.,* 632 F. 2d 487 (5th Cir. 1980) (coverage issue of whether contract covered employees at reopened plant are to be submitted to arbitrator); *Columbian Carbon Co. v. International Union of Operating Engineers, Local Union No. 405, AFL-CIO,* 360 F. 2d 1018 (5th Cir. 1966) (grievances filed by union claiming back-pay for temporary construction workers held arbitrable over argument by employer that under the terms of the contract, they were not covered by the contract and were not entitled to any of the benefits of the contract); *Communication Workers of America v. United Telephone Company of Ohio,* not officially reported, 85 LRRM 2771 (N.D. Ohio 1973) (proper classification of employees under contract is arbitrable).

not do so. The agreement variously refers to employees on the basis of tenure as: "regular employees considered for hire on a permanent basis," "extra men," "daily additional temporary men," "extra men [needed for] temporary help,"[9] "employees" on a probationary basis "new employees," "regular employees," "extra employees," "new employees without work experience," "employees with work experience when referred by the union," "casual employees," "temporary employees," "part-time employees," "seasonal employees," and "employees who work temporarily or in cases of emergency." Incredibly, the agreement even refers to "each regular employee even though such employee may work only part-time. . . ." (Schneider Pet. App. A-63-65).

Of particular significance is the wording of the agreements relating to the obligation to contribute to the Funds —Articles XIII and XIV. (Schneider Pet. App. A-62-63, A-63-65). Article XIII, Section 13.5, says that "each regular employee" is covered by Schneider's obligation to contribute to the Health and Welfare Fund. If so, does that mean that all other categories are excluded? The affidavit of Marvin Schneider indicates that it is Schneider's understanding that this is the open and established practice in the industry. (J.A. 38). However, Sec. 13.5 goes on to say that Schneider is obligated to make contributions on behalf of regular employees even though they work only part-time. Then in Section 13.6, the agreement excludes from the obligation "employees who work either temporarily or in cases of emergency." Perhaps that is

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[9]Thus the idea of "extra" and "temporary" are confused.

clear enough by itself, but what about extras, casuals, and seasonals? Schneider employs only "regulars" and "casuals." (J. A. 38). Are casuals included in Schneider's obligation to contribute to the health and welfare fund?

Similar, if not more confusing language was used to frame Schneider's obligation to contribute to the Pension Fund. Article XIV begins by saying that the obligation exists for each "regular employee" and goes on to say that the obligation exists even though the employee works only part-time. The agreement then states that excluded from the obligation to contribute are "employees who work part-time, temporarily, or in cases of emergency or any employee who does not perform 25 hours of work in a week." (Schneider Pet. App. A-63-65). Add to this the industry practice of excluding all "casuals" from fringe benefit coverage and you have a textbook case of a need for an arbitrator who is familiar with the parties and the industry. The Trustees cannot seriously contend that unraveling the foregoing maze constitutes a "simple collection case."

Thus, it would be a gross understatement to say that the coverage issue involves a question of interpretation and construction of the agreement. It is, therefore, presumed to be arbitrable. *United States Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U. S. 574, 582-83 (1960).

Schneider and the union had contracted for an arbitrator's judgment as to the correct interpretation and construction of the collective bargaining agreement. Just as a federal court should not reject that judgment after it has been rendered if it draws its essence from the contract, a federal court should not prevent the arbitrator's

judgment from ever being rendered. However, this will be the result if the opinion of the Court below is permitted to stand. The Trustees will circumvent the contractual procedure by filing suit directly in federal court asking the court to render its own interpretation of the agreement. This is contrary to federal labor policy. *See, Warrior and Gulf,* 363 U. S. 574, 578.

In the *Steelworkers Trilogy,* this Court clearly stated its position. Where the parties have bargained for an arbitrator's interpretation of the terms of the collective bargaining agreement, their bargain is to be honored and the federal courts are not to become involved in preempting the arbitrator's judgment either before or after it is rendered. *Warrior and Gulf,* 363 U. S. 574, 598-599.

The danger of undermining federal labor policy by failing to require the Trustees to submit to the contractually bargained for grievance and arbitration procedures in cases such as this one are evident. Even the majority in the panel decision below recognized the risk that allowing the District Court to interpret the provisions of the collective bargaining agreement might lead to a lack of uniformity in interpreting the bargaining agreement. 700 F. 2d 433, 443, n. 9; (Schneider Pet. App. A-38, n. 9). Respecting the bargain of Schneider and the union and requiring that the coverage issue to be resolved through the contractual procedure preserves intact the policy of encouraging collective bargaining.

B. Trustees shall be independent of union and employer influence in the administration of Taft-Hartley multiemployer employee benefit trust funds.

While the complaint alleges jurisdiction under § 301 of the Labor Management Relations Act and § 502 of ERISA, and purports to be an action to enforce Schneid-

er's obligation to make contributions under the collective bargaining agreement, the Trustees have attempted to bootstrap themselves into a position to resolve the coverage issue by calling it a matter of fund administration. In doing so, the Trustees have confused their responsibilities as fiduciaries in the administration of the funds with the responsibilities of Schneider and the local union to discharge their obligation to collectively bargain and resolve their disputes in accordance with the contractually agreed upon grievance and arbitration procedure.

This Court has recognized and emphasized the strict fiduciary standards that trustees of Taft-Hartley funds must maintain in the administration of the funds The duties are implied in § 302(c) (5) and are expressly set forth in § 404(a) of ERISA. *See, NLRB v. Amax Coal Co.,* 453 U. S. 322, at 331-32; *UMWA Health & Retirement Funds v. Robinson,* 455 U. S. 562, at 570-1. However, the administration of multiemployer plans within the meaning of § 302(c)(5) and ERISA does not include the resolution of disputes arising under the language of the collective bargaining agreement as to who is covered by the employer's obligation is to make contributions. The reasoning of the Ninth Circuit in *Hawkins v. Bennett,* 704 F. 2d 1157 (9th Cir. 1983), is sound. As the court stated in a footnote:

> The atmosphere in which employee benefit trust fund fiduciaries must operate, as mandated by 302(c) (5) and ERISA, is wholly inconsistent with this process of compromise and economic pressure. The management appointed and union appointed trustees do not bargain with each other to set the terms of the

> employer-employee contract; *they can neither require employer contributions not required by the original collectively bargained contract nor compromise the claims of the union or the employer with regard to the latter's contributions* . . . . (emphasis added).

Hawkins v. Bennett, 704 F. 2d 1157, 1159 n. 1.

The Court below also suggested that the rights asserted by the Trustees in this matter are statutory administrative duties and are, therefore, not subject to the grievance and arbitration clause of the contract, citing *Barrentine v. Arkansas Best Freight System,* 450 U. S. 728 (1981). 700 F. 2d 433, 441; (Schneider Pet. App. A-34). While the court did cite § 515 of ERISA, 29 U. S. C. § 1145, and the legislative history behind that provision, it did not cite any statutory authority or legislative history for the proposition that the determination or resolution of coverage issues is a statutory obligation or right of the Trustees which is outside the scope of the grievance and arbitration procedure. That is because there is no such authority.

Further, the legislative history relied upon by the Court below actually supports Schneider's position—not the Trustees'—that coverage issues are to be handled under the grievance and arbitration procedure.

The legislative history cited by the Court below was:

> The provision which was eventually enacted as [Sec. 515] was added to S. 1076 by the Senate Committee on Labor and Human Resources. The Committee explained that the provision was added because "simple collection actions brought by plan trustees had been converted into lengthy, costly and complex litigation concerning *claims and defenses unrelated to the employer's promise and the plans' entitlement to*

> *the contributions,"* and steps must be taken to "simplify delinquency collection." Senate Committee on Labor and Human Resources, S. 1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong. 2d Sess., 44 (Comm. Print, Apr. 1980) (1980 Senate Labor Committee Print). (emphasis added.) During floor debate, Senator Williams and Representative Thompson explained the purpose and meaning of [§ 515] and the same language used in the Senate Labor Committee Print.

See, 700 F. 2d 433, 440; (Schneider Pet. App. A-31-32). The Court below went on to state that the reference to "simple collection actions" in the legislative history is striking in light of the use of the same phrase by the court in *Central States, Southeast, and Southwest Areas Pension Fund v. Howard Martin, Inc.,* 625 F. 2d 171 (7th Cir. 1980). However, *Howard Martin* was rendered after the legislative history was written. § 515 was not enacted in response to *Howard Martin.* In addition, it is clear that the arbitration procedure to be used in resolving coverage disputes is perfectly consistent with and supportive of § 515 of ERISA. By requiring that coverage disputes be subject to arbitration, the true collection actions would be just that—collection actions, and not long-winded and complex interpretations of collective bargaining agreements. By following the contractual provisions set forth, the coverage disputes would be resolved before any court would become involved. In fact, the reliance of the Court below on § 515 is totally incongruous with the rest of the decision. By allowing funds to litigate the coverage issues in court without exhaustion of the contractual arbitration procedure, the federal courts will be burdening themselves with

questions of contract interpretation—just the problem § 515 is intended to eliminate.

The Court below also quoted from *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U. S. 562, 571-2 (1982), to support its conclusion that the need to maintain the independence of the Trustees from the union requires allowing the Trustees to sue directly in federal court to litigate coverage issues. The reliance of the Court below on the dicta of *UMWA Health and Retirement Funds v. Robinson* is misplaced. The opinion simply recites the purpose behind the enactment of § 302(c)(5) and the necessity for independent *administration* of trust funds by equal numbers of employee and employer representatives. The holding of the Court in *UMWA v. Robinson* is diametrically opposite to the proposition for which the Court below cited the opinion.

The reliance of the Court below on *Rosen v. Hotel & Restaurant Employees*, 637 F. 2d 592 (3rd Cir. 1981), is also misplaced. *Rosen* simply begs the question of who should determine the threshhold coverage issue: the union and the employer under the contract, or the trustees in federal court? The quote by the Court below from the *Rosen* opinion leaves this question unresolved. Further, the *Rosen* opinion completely ignores the union as the exclusive bargaining representative. It is the union in the first instance which negotiates with the employer to establish which employees will be covered by the employer's obligation to contribute to the funds. If the union and the employer had agreed initially that Mr. Rosen was in a class of employees on whose account the employer was not to make any contributions, would Mr. Rosen have had a cause of action? He would not

have. *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1953); *UMWA Health and Retirement Funds v. Robinson*, 455 U. S. 562 (1982). If he believed that the union had violated its duty of fair representation to him by failing to negotiate such contributions on his behalf, then his cause of action would have been against the union, and not against the fund which had no control over the union to dictate on whose behalf the union had to negotiate an obligation to contribute. If the logic of the Court below and the logic of the Third Circuit in *Rosen* is followed, are not the courts artificially creating a fiduciary obligation on the part of the trustees to police the conduct of the unions in enforcing what the trustees perceive the obligation to contribute to be.[10] The *Rosen* court went as far as to suggest that this includes the "obligation . . . to picket the non-contributing employer." 637 F. 2d 592, at 600. The opinion of the Court below and the opinion of the court in *Rosen* would seem to impose on trustees the obligation to compel the local union to force the employer to make contributions on behalf of all employees, to police the local union in enforcing that obligation, and to picket non-contributing employers. If this is so, then should this Court not also require that the trustees be seated at the bargaining table? Should they not be subject to a risk of the same economic harm under which employers and unions struggle and which is the catalyst for reaching a mutual accommodation?

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[10]The Court below referred to and recognized this emerging dilemma, which is created by allowing the Trustees to circumvent the union and the collective bargaining agreement by litigating coverage issues directly in federal court. 700 F. 2d 433, 441; (Schneider Pet. App. A-35).

If this is the case, then instead of preserving the independence of multiemployer trustees, there is a very real risk that they will become directly and immediately embroiled in the collective bargaining process and in the necessity for making trade-offs. This is exactly what the Court below fears will happen if the trustees are not allowed to litigate coverage issues.

In summary, if the Trustees are allowed to circumvent the dispute resolution procedure of the collective bargaining agreement by litigating coverage issues in federal court on the premise that matters of trust administration are involved, this will lead to their unnecessary involvement in the collective bargaining process. This is precisely what § 302(c) (5) and ERISA seek to avoid. Thus, the position of the Trustees and the opinion of the Court below may lead to the erosion of both of the federal policies which they argue support their position. The acceptance of the Trustees' position requires compromising both of the policies. On the other hand, the position taken by Schneider is consistent with both federal policies, allows each policy to support the other, and permits them to be applied in harmony.

II. As third party beneficiaries of the collective bargaining agreement, the Trustees' rights to receive contributions can be no greater than are provided in the agreement.

Taft-Hartley employee benefit funds are third-party beneficiaries of collectively-bargained obligations of employers to make contributions to the funds. *Lewis v. Benedict Coal,* 361 U. S. 459 (1960). It is fundamental that the rights of a third party beneficiary to a contract stem from the contract of which he is a beneficiary. *See,*

Rotermund v. United States Steel Corp., 474 F. 2d 1139 (8th Cir. 1973).

The promisor may, therefore, usually assert against the third-party beneficiary to the contract any defense which he could assert against the promisee if the promisee were suing on the contract. Unless some exception exists, the third-party beneficiary can be in no better position nor have more rights than are given to him in the contract. The rights of the Trustees to receive contributions from Schneider can be no greater than Schneider's obligation to contribute to the Funds as agreed to in the collective bargaining agreement.

This same principle relates to the Trustees' assertion that they may litigate questions of coverage under the collective bargaining agreement in federal court without awaiting resolution of coverage issues under the grievance and arbitration procedure. The Trustees as third-party beneficiaries must await a determination as to which employees are covered by the employer's obligation to contribute. Schneider and the union first attempted to do this when they negotiated the collective bargaining agreement. However, their efforts rather obviously failed, due—no doubt—in large part to their loose way of defining the obligation and defining the differences between regular employees, part-time employees, seasonal, extras, casuals, and temporary help (among others). (*See*, Appendix B.) Further, notwithstanding the wording of the contract, the practice in the industry is to cover only "regular" employees and not "casuals" for fringe benefits. How can the Trustees know if they are entitled to additional contributions until these issues are resolved? That is, the Trustees should be required to request that

the union, as the statutory bargaining representative of the employees, initiate the grievance and arbitration procedure to determine questions of coverage.

Of course, as the Court below recognized:

> Certainly it is true that arbitration, pension funds, and health and welfare funds, are all matters of contract. They either exist or not as the parties have agreed in the collective-bargaining contract and related documents. If the agreements in the cases before us provided in express words that trustees' claims could not come to court before questions of contract interpretation had been settled by arbitration, this would be quite a different case.

700 F. 2d 433, 442; (Schneider Pet. App. A-37). However, the Court below unfortunately stopped its analysis with the foregoing pronouncement. Had it analyzed the documents and tried to discern the true intentions of all of the parties, it would have reached an entirely different conclusion which is consistent with federal labor policy. Examination of the Trust Agreement,[11] on which the Trustees have relied so heavily to support their argument, reveals the following:

(1) It is an agreement between groups of Teamster unions and groups of employers. (J. A. 14).

(2) It is a trust fund for the purpose of accumulating and paying retirement benefits. (J. A. 15).

(3) The second recital of the premises of the trust agreement states:

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[11](J.A. 14).

> WHEREAS, the Union[12] and the Employer have heretofore entered into *collective bargaining agreements under the terms of which it is provided that the Employer shall contribute certain agreed-upon sums of money* therein set forth to a Pension fund . . . . (Emphasis added).

(J. A. 15).

(4) "Employee" is defined as someone employed under a collective bargaining agreement and "*on whose behalf payments are required by such collective bargaining agreement* or applicable law . . . ." (Emphasis added). (J. A. 16).

(5) The assets are derived from "Employer contributions made pursuant to the collective bargaining agreement between the parties. . . ." (J. A. 18).

(6) The Trustees require that:

> [e]ach Employer shall make continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement between the parties.

(J. A. 21).

(7) The Trustees have the power to demand and collect the contributions of the Employers to the Fund and [to file suit to collect] without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purpose. (J. A. 22).

(8) The Union will comply with any reasonable request of the Trustees to examine those records of the

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[12]In the preamble, "Union" is defined as the "CENTRAL CONFERENCE OF TEAMSTERS AND THE SOUTHERN CONFERENCE OF TEAMSTERS, and their affiliated *Local Unions*'. . . ." (emphasis added) (J.A. 14).

Union which may indicate the employment record of any Employee whose status is in dispute. (J. A. 23).

(9) The Trustees are protected from liability if they rely on documentation which is furnished to them. (J. A. 24 and 27).

(10) The Trustees may make rules to administer the trust, consistent with the collective bargaining agreements and the Trust Agreement. (J. A. 24).

(11) The Trustees may delegate certain matters to local unions. (J. A. 25).

(12) The Trustees may make rules allowing for accrual of benefits while employees are not actually working, i.e., disability, "but not contrary to applicable collective bargaining agreements." (J. A. 25).

(13) The Trustees have the power to construe the Trust Agreement and the Pension (or Health and Welfare Plan). (J. A. 26).

(14) When claims for benefits are filed, the Trustees may rely on documents filed by employers and local unions. (J. A. 27).

(15) Only "covered Employees" may be eligible for benefits. (J. A. 28).

It is clear, therefore, that the Trust is drawn with full recognition that the collective bargaining agreement is the basis of the Trustees' right to receive contributions. See items (3), (4), (5), (6), and (12) above. Those provisions all contain references to the controlling nature of the collective bargaining agreement. Thus, the trust

agreement truly reflects the status of the Trustees as third-party beneficiaries of the collective bargaining agreement.

The Trustees argue that *Lewis v. Benedict Coal Corp.*, 361 U. S. 459 (1960), creates a rule that they are uniquely situated third-party beneficiaries who are exempt from dispute resolution provisions in the collective bargaining agreement. In *Lewis,* the Court held that an employer could not set off against a third-party beneficiary welfare fund, a claim the employer had against the union. In reaching its decision, the Court observed that a welfare and retirement plan established under Section 302(c) of the Taft-Hartley Act was not a typical third-party beneficiary. *Lewis,* however, is clearly and significantly distinguishable. The distinction made by the Seventh Circuit in *Central States, Southeast and Southwest Areas Pension Fund v. Howard Martin, Inc.,* 625 F. 2d 171, 172 (7th Cir. 1980) is sound:

> In *Lewis,* however, the employer's liability for payments to the Fund was conceded, the case dealt with the employer's claimed right to withhold payments and setoffs of damages, and no arbitration clause was present in the contract or discussed by the Court. Whether the Funds' special third party status would require a specific provision entitling an employer to set off payments admittedly owed is irrelevant here, where the existence of the obligation to make certain payments depends on the interpretation of the contract and the contract specifically requires arbitration on questions of interpretation.

The Court below concluded that: "[*Lewis*] is recognized as establishing an exception to the general rule that defenses good against the promisee are good against the donee beneficiary such as the Funds." 700 F. 2d 433, 437;

(Schneider's Pet. App. A-25). The fact that Lewis may have created an exception has no application here. Schneider does not seek a setoff based on a claim against the union. Schneider simply asserts that the terms of the collective bargaining agreement set forth a specific procedure for the resolution of disputes, such as this coverage dispute, and that this procedure should be followed.

In addition, *Lewis* has no application here since *Lewis* created no exception to the rule that a third-party beneficiary can assert no right greater than the rights given to the beneficiary under the contract. The Trustees are seeking to assert a right in this case which is greater than the right granted to them by the union or Schneider in the collective bargaining agreement.

Just last term, this Court took the opportunity to limit *Lewis* to its facts in *Kaiser Steel Corp. v. Mullins*, 455 U. S. 72 (1982). Like the Trustees in the case before the Court, the respondents in *Kaiser* argued that § 515 of ERISA established a special rule regarding the availability of defenses to employers in actions brought by employee benefit fund trustees for delinquent contributions. 455 U. S. 72, 86-88. The Court held that assuming *arguendo* that § 515 applies, it carries with it a requirement that it may only be enforced to the extent not "inconsistent with law." Section 515 also provides that employers shall make contributions "in accordance with the terms and conditions of such plan or such [collectively bargained agreement]." Thus, § 515 recognizes what in fact must be true. Enforcement actions for allegedly delinquent contributions must be based on the terms of the collective bargaining agreement and can be no greater than are provided in the agreement. Therefore, the Trustees, as third-party beneficiaries, must await a reso-

lution of the coverage issue under the terms of the collective bargaining agreement.

Further, the Court concluded in *Kaiser* that the purpose of § 515 was not to prevent employers from raising any and all defenses; "rather they spoke in terms of 'unrelated' and 'extraneous' defenses." The defense raised by Schneider here is not "unrelated" or "extraneous." The determination of the coverage issue is directly related to the question of Schneider's obligation. Therefore, the defense that this matter must first be subjected to the grievance and arbitration procedure under the collective bargaining agreement is a proper defense to present against the Trustees as third-party beneficiaries of the collective bargaining agreement.

The Trustees assert that they have a right and obligation to litigate questions of coverage involving interpretation of the collective bargaining agreement in federal court without resort to arbitration. Where did this right originate? Neither Schneider nor the union has such a right under the collective bargaining agreement. Section 515 of ERISA does not give them that right. The artificial creation of such a right for a third-party beneficiary Taft-Hartley fund would clearly undermine the federal labor policy favoring collective bargaining; would be contrary to the intent of the Central States trust agreements that their right to receive contributions is determined by the terms of the collective bargaining agreements; would serve no purpose since the contractual dispute resolution methods are available; and would not further any duties owed by the Trustees to the participants or beneficiaries since such duties would be discharged by a resort to the grievance and arbitration procedure under the contract.

III. The majority of the Courts of Appeals that have reviewed this issue have concluded that coverage issues must first be submitted to the grievance and arbitration procedure under the terms of the collective bargaining agreement.

The majority of the courts of appeals that have considered the issue have ruled that where an interpretation or construction of the contract language is required in order to determine which employees are covered by the obligations to contribute, the issue must first be submitted to the grievance and arbitration procedure under the collective bargaining agreement. On the other hand, most of the same courts have concluded that where the action instituted by the trustees of funds is a mere collection action to recover delinquent contributions, the trustees may institute such collection actions in federal court.

A. Circuits approving deferral requirement: Fourth, Sixth, Seventh and Ninth.

The Seventh Circuit Court of Appeals was the first court of appeals to rule on the issue. In *Central States, Southeast and Southwest Areas Pension Fund v. Howard Martin, Inc.*, 625 F. 2d 171 (7th Cir. 1980), the language contained in the collective bargaining agreement was nearly identical to the language in this case. There, as here, the same Trustees filed a collection suit against the employer seeking contributions claimed to be owed under the terms of the collective bargaining agreement. The employer moved to dismiss, alleging absence of subject matter jurisdiction, because the arbitration provisions contained in the collective bargaining agreement had not

been exhausted. The District Court granted the motion to dismiss and the Seventh Circuit Court of Appeals affirmed, reasoning that:

> We agree with the funds, as does Martin, that the funds are not required to arbitrate disputes over delinquent payments. However, [District] Judge Nolan was correct in finding that this is not a simple collection case, but a case turning on which, if any, of the disputed workers were covered by the contract. Until that question is resolved, it is impossible to determine whether there is any delinquency on which to base a collection action under Articles 60 and 61. The parties to the contract clearly intended, as reflected in their inclusion of Article 8, that such questions of contract interpretation be resolved by arbitration.

625 F. 2d 171, 172. The same Trustees argued in *Howard Martin*, as here, that they had no access to the arbitration process. The Court answered that:

> The argument falls of its own weight, however. To trigger the arbitration process, the Funds need only inform the Union, the members of which the Funds exist to serve, that Martin disputes the coverage of certain worker, and ask the Union, the organization of primary interest, to file a grievance against Martin (footnote omitted.)

625 F. 2d 171, 173.

This same issue was recently addressed by the Fourth Circuit Court of Appeals in *Trustees of National Benefit Fund for Hospital and Health Care Employees v. Constant Care Community Health Center*, 669 F. 2d 213 (4th Cir. 1982). The Court of Appeals reversed the district court's dismissal of the Fund's complaint. The Court approved and adopted the reasoning of *Howard Martin*, but ruled that the case before it was a simple collection

case to which no substantive defenses had been asserted by the employer. The Court, approving *Howard Martin*, stated that where the case involves a dispute arising out of an interpretation of the contract, and the contract calls for arbitration of such disputes, the case must first be submitted to arbitration.

The Court went on to hold that:

> As the quoted passage from *Howard Martin* discloses, the rationale of that decision was that the case was not a simple collection matter; rather, it was an underlying question of contractual interpretation warranting arbitration which was a prerequisite to collection.

The Ninth Circuit Court of Appeals recently rendered a decision on this same issue in *Laborers Health and Welfare Trust Fund v. Kaufman & Broad of Northern California, Inc.*, 707 F. 2d 412 (9th Cir. 1983).

In *Kaufman & Broad*, the Fund sued the employer as the result of the employer's failure to make contributions on behalf of non-union workers doing "callback" work. The employer claimed that "callback" work was not covered under the collective bargaining agreement and that it was not required to make contributions on behalf of the employees doing such work. The employer removed the case to federal court and moved for summary judgment.

The district court granted summary judgment in favor of the employer finding that there was no genuine question of fact as to whether or not "callback" work was covered under the collective bargaining agreement. Adopting a position that is ironically diametrically opposed to the position of the Trustees here, the Fund argued on appeal that the district court should have stayed the pro-

ceedings pending the outcome of arbitration of the coverage issue pursuant to the collective bargaining agreement.

The Ninth Circuit, taking somewhat of a different approach from cases decided to date on this issue, found that the funds were subject to the arbitration clause of the collective bargaining agreement but that they had waived their right to invoke the use of the arbitration process. The Court stated:

> That the Funds are third party beneficiaries rather than parties to the collective bargaining agreement does not alter our view of the waiver issue. As the Funds point out in their own brief, third party beneficiary trust funds, like the parties to a labor contract, may be required to arbitrate issues properly governed by the arbitration provisions of a collective bargaining agreement. *Central States, Southeast and Southwest Areas Pension Fund v. Howard Martin, Inc.*, 625 F. 2d 171 (7th Cir. 1980). Moreover, where the trust funds are the aggrieved party, they may be required to trigger the arbitration process by informing the Union of an arbitrable dispute. *Id.* at 172. They both stand in the same position with respect to arbitration as parties to the collective bargaining agreement, and are thus subject to the waiver doctrine.

707 F. 2d 412, 417.

The *Kaufman & Broad* court then went on to state that since there was a waiver and since the employer did not in this case wish to compel arbitration, the district court could properly assume jurisdiction. The trust fund was held to have waived its right to arbitration and the employer chose to assert the waiver as a defense. This decision is consistent with the *Howard Martin* reasoning and the reasoning of the District Court below in this case that

arbitration of covered issues may be required where arbitration is properly raised.

However, the Ninth Circuit deviated from sound reasoning in one respect. The Court erred in ruling that the district court could properly assume jurisdiction over the coverage question. It should have ruled that the coverage question had been resolved against the Funds by waiver. In other words, it does not contravene federal labor policy to hold that if an issue is not raised in timely fashion, it is barred.

In *Central States, Southeast and Southwest Areas Pension Fund, et al v. Central Transport, Inc., et al.*, 698 F. 2d 802 (6th Cir. 1983), *pet. for cert. filed,* the same Trustees who are the Respondents here brought suit seeking a preliminary injunction to require the employer to provide the Funds with certain information with respect to all employees of the employer. The Sixth Circuit held that neither ERISA's statutory disclosure provisions nor any contractual provisions entitled the Funds to conduct such a broad inspection of records. The Court held that there was a limited right to inspect employee records, which was limited to "factual situations in which the Trustees had reasonable cause to believe that a particular person is covered by a collective bargaining agreement but has not been placed on the union's seniority list or otherwise classified by [the employer] or the Union as a covered employee." 698 F. 2d 802, 811.

The Court described the means by which the covered or non-covered status of a group of employees was to be determined. The Court said:

> Entitlement to funds' benefits may be established by a concession among the parties that a particular

> individual is a covered employee or person otherwise entitled to the funds' benefits. Entitlement may also be established by the judicial or arbitral process where there is no concession that an employee, or one claiming under him or her, is a covered employee.

698 F. 2d 802, 811.

The clear holding of the Sixth Circuit is that where the collective bargaining agreement dictates the method of determining coverage, that method must be followed in order to determine whether a particular employee or group of employees is in fact "covered." The import of the Sixth Circuit's decision is that the Trustees, as third-party beneficiaries, are bound by the terms of the collective bargaining agreement.

B. Circuits ruling that the Trustees may litigate coverage issues: Fifth and Eighth.

In another recent case, the Fifth Circuit Court of Appeals tangentially considered the issue before the Court. In *Bugher v. Consolidated X-Ray Service Corporation,* 705 F. 2d 1426 (5th Cir. 1983), both the trustees of the pension fund and the union sued for delinquent amounts allegedly owed under the terms of the collective bargaining agreement. The employer raised the defense that the trustees and the union had failed to arbitrate the issue, citing *Howard Martin* in support of their position. The trustees and the union appeared to have waived the right to arbitrate by failing to timely exercise this right. The Court distinguished the case from *Howard Martin* stating that in *Bugher* the collective bargaining agreement only required arbitration "between the parties." The Fifth Circuit, obviously searching for a method of resolving the coverage question, held that since the

collective bargaining agreement only required invocation of the grievance and arbitration procedure "between the parties," the trustees were not bound by that procedure. The Fifth Circuit went on to say that the trust agreement in that case authorized the trustees to go directly to court to pursue delinquent employer contributions. However, the court ignored the fact that the trust agreement only permitted the trustees to go to court to collect contributions to which they were entitled and which were in fact delinquent. Nowhere did the trust agreement authorize the trustees to go to court to litigate questions of coverage under the collective bargaining agreement. The Fifth Circuit, by distinguishing *Howard Martin* completely missed the point of *Howard Martin*. While it was true that the trustees were not included in the arbitration provision of the collective bargaining agreement, that did not prevent the trustees from calling on the union to process the issue.

The Fifth Circuit also concluded that the *union* was not bound by the grievance and arbitration provisions of the collective bargaining agreement because it had the right to strike over allegedly delinquent contributions. Similarly, in the case before the Court, the collective bargaining agreement reserves to the union the right to strike or to go to arbitration over a grievance. (Schneider Pet. App. A-32). Contrary to the reasoning of the Fifth Circuit, it is submitted that this fact further establishes that Schneider and the union intended that coverage issues, like other interpretation issues, should be resolved under the terms of the collective bargaining agreement, whether by arbitration or strike. 705 F. 2d 1426, 1433-34.

The Fifth Circuit thus avoided the issue and also concluded that the union itself might go directly to fed-

eral court and litigate the coverage question. As can be seen, the Fifth Circuit is clearly at odds with the federal labor policy favoring arbitration. Unfortunately, it appears that the court did this to achieve the result it thought should have been reached. The fact that the trustees and the union in the *Bugher* case had waived the grievance and arbitration provisions of the contract should have concluded the case. Instead, the Fifth Circuit felt compelled to go clearly against precedent and the federal labor policy favoring arbitration in order to reach its result. In reaching its decision, the Fifth Circuit also felt compelled in dicta to adopt the reasoning of the Eighth Circuit Court of Appeals in the case below.

———o———

C. SUMMARY

Thus, except for the Eighth Circuit below and the dicta contained in *Bugher v. Consolidated X-Ray Service Corporation, supra,* all of the circuit courts of appeals which have considered the coverage resolution issue have ruled that where there is a genuine dispute involving the interpretation of the terms of the collective bargaining agreement, such a dispute must be resolved through the contractual grievance and arbitration procedure prior to any action to collect such contributions. The rationale of the decisions so holding was that no right of collection can be determined by a court contrary to the terms of the document that created the right. Until the question of coverage under the collective bargaining agreement is resolved, it is impossible to make a determination as to whether or not there is a delinquency which will support

a collection action. The courts correctly recognize that where the existence of the obligation to make certain payments depends upon the interpretation of the collective bargaining agreement and the collective bargaining agreement specifically requires arbitration on questions of interpretation, the court must defer to arbitration.

CONCLUSION

For the foreging reasons, the Court of Appeals decision should be reversed, and the order of the District Court dismissing the complaint should be affirmed.

Respectfully Submitted,

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November 17, 1983

APPENDIX A

STATUTES INVOLVED

Act of July 5, 1935, 49 Stat. 453, as amended by Act of June 23, 1947, 61 Stat. 143, as amended, Section 9, 29 U. S. C. § 159.

Representatives and elections

(a) Exclusive representatives—Employees' adjustment of grievances directly with employer. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Act of June 23, 1947, 61 Stat. 157, as amended, Section 302, 29 U. S. C. § 186.

Restrictions of payments to employee representatives

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator

of any motor vehicle (as defined in part II of the Interstate Commerce Act [49 USCS §§ 301-327]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and em-

ployees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of employees may agree upon and in the event the employer and the employers and the representatives of employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities. . . .

Act of Sept. 2, 1974, 88 Stat. 877, as amended by Act of Sept. 26, 1980, 94 Stat. 1296, Section 404(a), 29 U.S.C. § 1104(a).

Fiduciary duties

(a) Prudent man standard of care. (1) Subject to sections 403(c) and (d) [29 U. S. C. § 1103(c) and (d)], 4042 [29 U. S. C. § 1342], and 4044 [29 U. S. C. § 1344],

a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

Act of Sept. 26, 1980, 94 Stat. 1295, Section 515, 29 U. S. C. § 1145.

Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

APPENDIX B

SUMMARY OF COLLECTIVE BARGAINING AGREEMENTS PROVISIONS

(1) CONTRACT SECTION AND APPENDIX REFERENCES	(2) SUBJECT	(3) TENURE STATUS OF EMPLOYEE MENTIONED IN CONNECTION WITH BENEFIT
Sec. 1.2 (Schneider Pet. App. A-45).	Definition of "Employee"	Inclusion in collective bargaining unit
Sec. 2.1(A) (Schneider Pet. App. A-46).	Union referrals	"Regular employees considered for hire on a permanent basis"
		"Extra men" needed for "daily additional manpower."
		"Daily additional temporary men"
		"Extra men" needed for "temporary help"
Sec. 4.1 (Schneider Pet. App. A-49).	Seniority and layoff	"Regular employees who have been employed for a period of sixty (60) days or more"
Sec. 4.2 (Schneider Pet. App. A-49).	Probationary employment; seniority	"An employee, new to the company who otherwise qualifies, shall be considered on a trial basis for a period of no longer than sixty (60) calendar days"
	"all fringe benefits"	"A new employee" . . . "after one hundred twenty (120) days

		following the first date of his employment unless he had been immediately previously employed and covered as a regular in industry"
	Vacation benefits	"An employee shall qualify . . . as outlined in Article XV [Vacations]."
	Holidays	"New employees" . . . "after sixty (60) days of employment"
Sec. 4.4 (Schneider Pet. App. A-50).	Roster Posting in order of date of employment	"Regular employees"
Sec. 10.1 (Schneider Pet. App. A-54).	Standards of conduct	"All employees"
Sec. 10.2 (Schneider Pet. App. A-55).	Warnings and Discharge	"Any employee"
Sec. 10.3 (Schneider Pet. App. A-55).	Time limit for filing grievance for discharge	"Any employee"
Sec. 11.2 (Schneider Pet. App. A-56).	Call-in time; 6 hours pay	"Employees"
	Call-in time; time of calculating	"Extra employees"
Sec. 11.3 (Schneider Pet. App. A-56).	Pay periods; Friday payday	"Regular employees"
	Pay periods; payable on completion of work	"Extra employees"
	Itemized statement	"All employees"

Sec. 11.7 (Schneider Pet. App. A-58-59).	Travel allowance	"All employees"
Sec. 11.8 (Schneider Pet. App. A-59).	Holidays	"Regular employees"
Sec. 12.1 (Schneider Pet. App. A-60).	Straight time Hourly rates	"Employees"
Sec. 12.2; Schneider Pet. App. A-61).	$.80 per hour below scale wage rate	"New employee without previous experience in the moving industry in St. Louis"
	Wage rate	Employee with work experience when referred by the union.
	$1.50 per hour wage rate below helpers rate	"Casual, temporary, or part-time employees, exclusive of employees who regularly report to the union employment office"
	Definition	"A casual or temporary employee is one who, hired for the day, and without promise of continued employment, is terminated upon the completion of the day."
	Definition	"A part-time employee is one who normally has a regular job elsewhere."
	Wage rate of $1.50 per hour less than the helpers rate	"Seasonal employee"

	Union security	"Seasonal employees"
Sec. 13.1 (Schneider Pet. App. A-62).	Contributions to Central States, Southeast and Southwest Areas Health and Welfare Fund	"Each employee covered by this agreement who has been on the payroll sixty (60) days or more, after completing his probationary period as provided for in Section 4.2"
Sec. 13.5 (Schneider Pet. App. A-63).	Employees covered by employer's obligation to make contributions to Health and Welfare Fund	"Each regular employee, even though such employee may work only part time . . . including weeks where work is performed for the employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other health and welfare fund."
Sec. 13.6 (Schneider Pet. App. A-63).	Employees excluded from Welfare Fund coverage contribution obligation	"Employees who work either temporarily or in cases of emergency"
Sec. 13.6 (Schneider Pet. App. A-63).	Weekly disability Supplement	"Employee . . . found by the Workmen's Compensation Commission to be eligible for compensation under the law."
Art. XIV (Schneider Pet. App. A-63-65).	Pensions	"Each regular Employee . . . who has been on the payroll for sixty (60) days or more after becoming a regular employee."

	Employees covered by employer's obligation to make contributions to Pension Fund	"Each regular employee even though such employee may work only part-time under the provisions of this contract, including weeks where work is performed for the employer but not under the provisions of this contract, and although contributions may be made to the Pension Fund"
	Employees excluded from pension fund coverage contribution obligation	"Employees who work part-time, temporarily, or in cases of emergency, under the terms of this contract . . .; and . . . any employee who does not perform 25 hours of work in any week."
	Minimum pension contribution of 35 weeks per year	"Each regular employee"
Sec. 15.1 (Schneider Pet. App. A-65).	Vacations	"Any employee employed [for certain lengths of time] by the same company"
	Minimum service required for vacation	"Employee" who "has worked a total of 1200 hours for one company in the year immediately preceding the date of his eligibility for such vacation."

Sec. 18.1 (Schneider Pet. App. A-67).	Prescripticare	"Each employee covered by this agreement who has been on the payroll thirty (30) days or more."
Sec. 18.5 (Schneider Pet. App. A-68).	Coverage	"Each regular employee, even though such employee may work only part-time under the provisions of this contract, and although contributions may be made for those months where work is performed for the Employer but not under the provisions of this Contract, and although contributions may be made for those months into some other fund."
	Exclusion from coverage	"Employees who work either temporarily or in cases of emergency under the terms of this contract"
Sec. 20.8 (Schneider Pet. App. A-70).	Transfer from company to company; consent required	"Employee . . . provided all regular employees of the company receiving the transferred employees are working"
Art. XXIII (Schneider Pet. App. A-73).	Funeral leave	"An employee"
Art. XXIV (Schneider Pet. App. A-73).	Jury duty leave	"Regular employees"

The references in the three collective bargaining agreements attached to the Respondents' Complaint as Exhibits 1 and 2, read substantially the same as those parts of Exhibit 3 summarized above, except for Section 12.2 of Exhibit 1—the 1970 to 1973 Agreement—and Exhibit 2—the 1973 to 1976 Agreement. Section 12.2 of the 1973 to 1976 Agreement is set forth in the Joint Appendix at page 12, and the 1970 to 1973 Agreement is set forth in the Joint Appendix at page 13. Those references to classes of employees based on tenure are as follows:

(1) CONTRACT SECTION AND JOINT APPENDIX REFERENCES	(2) SUBJECT	(3) TENURE STATUS OF EMPLOYEE MENTIONED IN CONNECTION WITH BENEFIT
Excerpt from Plaintiff's Exhibit 2, Attached to Plaintiff's Complaint Against Schneider—Section 12.2 of Collective Bargaining Agreement Effective March 1, 1973, to February 28, 1976		
Sec. 12.2 (J.A. 12).	$.80 per hour below scale wage rate	"A new employee without previous experience in the moving industry in St. Louis"
	Regular wage rate	"An employee with work experience with companies which are members of this Association, when referred by the Union, shall be paid at the rate stated for his class."
	Rate of $2.50	"Casual, temporary, or part-time employees, exclusive of employees who

	regularly report to union employment office"
Definition	"A casual or temporary employee is one, who hired for the day, and without promise of continued employment, is terminated upon the completion of the day."
Definition	"A part-time employee is one who normally has a regular job elsewhere."
Wage rate	"A seasonal employee may be hired at the rate of $2.50 per hour for his first season with the Industry, $2.75 per hour for his second season with the Industry, $3.00 an hour for his third season with the Industry, and $3.25 an hour for his fourth season with the Industry."
Definition	"A seasonal employee is one, such as a student, who is hired for a seasonal period customarily between May 15 and September 15.

	Union security; continued employment	"Thirty-one days following employment a seasonal employee"

Excerpt from Plaintiff's Exhibit 1, Attached to Plaintiff's Complaint against Schneider—Section 12.2 of the Collective Bargaining Agreement Effective March 1, 1970, to February 28, 1973

Sec. 12.2 (J.A. 13).	Wage rate $.80 per hour less than scale	"A new employee without previous experience in the Moving Industry in St. Louis"
	Rate of $2.00 per hour	"Casual, Temporary, Seasonal, or part-time employees"
	Definition	"A casual or temporary employee is one who, hired for the day, and without promise of continued employment, is terminated upon completion of the day."
	Definition	"A seasonal employee is one, such as a student, who is hired for a seasonal period customarily between May 15 and September 15.
	Definition	"A part-time worker is one who normally has a regular job elsewhere."
	Wage rate	"An employee with work experience with

	companies which are members of this Association, when referred by the Union."
Union security; continued employment	"A seasonal employee" within thirty-one days following employment"

NOS. 82-1860 and 82-1862

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

SCHNEIDER MOVING & STORAGE COMPANY, PETITIONER,
AND
PROSSER'S MOVING AND STORAGE COMPANY, PETITIONER,

V.

LORAN W. ROBBINS, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION OF PETITIONER SCHNEIDER MOVING AND STORAGE COMPANY TO INCREASE NUMBER OF COUNSEL ARGUING AND REQUESTING ADDITIONAL TIME FOR ORAL ARGUMENT

Comes now David F. Yates, a member of the Bar of this Court and Counsel of Record for Petitioner in No. 82-1860, Schneider Moving & Storage Company, who, pursuant to Rules 38.3, 38.4, and 42, respectfully requests that in consolidated Cases Nos. 82-1860 and 82-1862 the number of counsel arguing for the Petitioners be increased from one to two and that the time for oral argument be expanded to a total of forty (40) minutes for the Petitioners' side. The following reasons are stated for these requests.

1. These are consolidated cases in which separate briefs have been filed for the Petitioners in 82-1860 and 82-1862.

2. Petitioner in Case No. 82-1860, Schneider Moving & Storage Company, has expressly requested that its case not be presented by counsel for Petitioner in Case No. 82-1862. The clients of Counsel in these consolidated cases perceive a conflict of interest which suggests an impropriety in having both cases argued by the same counsel. Therefore, in accordance with the Canons of Ethics, it is submitted that oral argument for each of the Petitioners should be presented by separate counsel.

3. The Petitioner in case No. 82-1862, Prosser's Moving and Storage Company, has raised an issue which the Petitioner Movant in No. 82-1860 has not raised and is not prepared to argue, to-wit: How broad is the right of the trustees of Taft-Hartley multiemployer employee benefit trust funds to audit employers' payroll records, as that issue is defined in Case No. 82-1862?

4. Counsel for Petitioners in the consolidated cases are unable to agree between themselves who will argue.

5. The Court granted certiorari in these cases to consider whether Taft-Hartley multiemployer employee benefit trust funds should be required to await exhaustion of the grievance and arbitration procedure in a collective bargaining agreement before filing suit in federal court for allegedly delinquent contributions where there are factual coverage issues subject to resolution under the contractual grievance and arbitration procedure. The facts in each of the cases are somewhat different and will allow the court to consider the issues in different factual settings. Counsel for each of the Petitioners is intimately familiar with the particular factual settings of the

case in which he has been involved and would therefore be able to assist the Court in consideration of the issues.

6. If this request is granted Counsel will coordinate the presentations to avoid duplication and to avoid wasting the Court's time.

7. Should the Court grant the request to increase the number of counsel arguing, it is respectfully requested that a total of 40 minutes be granted to Petitioners in order to adequately present the oral argument to the Court.

8. Counsel understands that Counsel in Case No. 82-1862 is presenting a similar request to the Court.

9. Counsel for the Respondent has stated that he has no objection to the grant of this request.

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CERTIFICATE OF SERVICE

I certify that on December 2, 1983, a true copy of the foregoing Motion was served on all Counsel of record in this proceeding by depositing two copies thereof in the United States Mail, postage prepaid, and addressed to:

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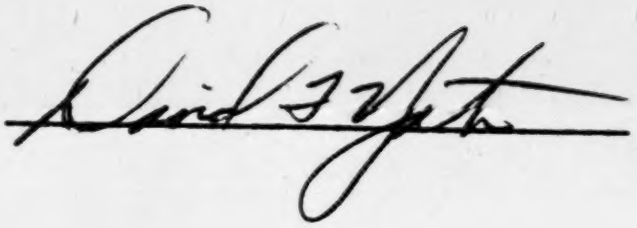

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Nos. 82-1860 and 82-1862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SCHNEIDER MOVING and STORAGE COMPANY,
Petitioner

and

PROSSER'S MOVING and STORAGE COMPANY,
Petitioner

v.

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States Southeast and Southwest Areas Pension Fund,
Respondents,

and

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States Southeast and Southwest Areas Health and Welfare Fund,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF ON THE MERITS FOR PETITIONER PROSSER'S MOVING AND STORAGE COMPANY

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QUESTIONS PRESENTED

Employee benefit funds established under Sec. 302(c) of the Taft-Hartley Act, 29 U.S.C. §186(c), are third-party beneficiaries to collective bargaining agreements. The question presented is:

May trustees of employee benefit funds sue an employer for breach of the collective bargaining agreement before exhausting the mandatory grievance and arbitration procedure set forth in the agreement where: (1) the claims of the trustees raise questions as to the meaning and application of the agreement, and (2) the agreement requires that such claims be resolved through the grievance and arbitration procedure.

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Nos. 82-1860 and 82-1862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SCHNEIDER MOVING and STORAGE COMPANY,
Petitioner

and

PROSSER'S MOVING and STORAGE COMPANY,
Petitioner

v.

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD MCDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States Southeast and Southwest Areas Pension Fund,
Respondents,

and

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD MCDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States Southeast and Southwest Areas Health and Welfare Fund,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF ON THE MERITS FOR PETITIONER PROSSER'S MOVING AND STORAGE COMPANY

OPINIONS BELOW

On November 7, 1980, the Honorable John K. Regan, United States District Judge for the Eastern District of Missouri,

Eastern Division, entered his order dismissing respondents' complaint, without prejudice, together with a memorandum of law in support of the order of dismissal. The unreported order, memorandum, and companion memorandum are reproduced in Prosser's Pet. Cert, Appendix at A.51, A.41 and A.46, respectively.

Respondents appealed to the United States Court of Appeals for the Eighth Circuit. On March 24, 1982, a split decision by a three-judge panel reversed the order of the district court and remanded the case for further proceedings consistent with the opinion. The opinions, which were not reported, are reproduced in Prosser's Pet. Cert. at A.27 and A.36. Thereafter, on June 4, 1982, the Court of Appeals granted petitioner's petition for rehearing *en banc,* as set forth in its unreported order reproduced in Prosser's Pet. Cert. at A.26.

On February 16, 1983, the Court of Appeals filed its *en banc* opinion in this cause, which has been reported at 700 F.2d 433 (8th Cir. 1983). The majority and dissenting opinions are reproduced in Prosser's Pet. Cert at A.1 and A.19, respectively.

JURISDICTION

The *en banc* judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 14, 1983. (Prosser's Pet. Cert. A.24).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) for review by Writ of Certiorari. The petition for Certiorari was filed on May 17, 1983, and granted on October 3, 1983, 52 U.S.L.W. 3230. A petition for Certiorari was also filed in the case of *Schneider Moving and Storage Co.* v. *Robbins, et. al.*, No. 82-1860, which was also granted on October 3, 1983, 52 U.S.L.W. 3230. The two cases have been consolidated.

STATUTES INVOLVED

This case involves Sections 203(d), 301(a) and 302(c)(5) of the National Labor Relations Act, 29 U.S.C. §§173(d), 185(a), 186(c)(5) (1976); Sections 2(b), 502, 514(d) and 515 of the Employee Retirement Income Security Act, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§1001(b), 1132, 1144(d), 1145 (1980). These statutory provisions are set forth in the Appendix to the Brief on the Merits.

STATEMENT OF THE CASE

On March 19, 1980, the Trustees of the Central States Health and Welfare and Pension Funds[1] (hereinafter the "Trustees"), instituted suit against petitioner, Prosser's Moving and Storage Company (hereinafter "Prosser"), alleging that they were aggrieved because Prosser had violated the 1976[2] and 1979 collective bargaining agreements entered into with Local Union 610, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the "Union"), and ancillary pension and health and welfare trust indenture agreements. The Trustees based jurisdiction of the district court on Section 301(a) of the Labor Management Relations Act of 1947 (LMRA), as amended, 29 U.S.C. §185(a) (1976), and on Section 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132. (J.A.2, 41).

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[1] The Trust Funds were established pursuant to Section 302(c)(5) the Labor Management Relations Act of 1947, 29 U.S.C. §186(c)(5), (1976).

[2] Schneider Moving and Storage Co., in its Petition for Certiorari, has set forth the terms of the 1976 collective bargaining agreement agreed to by Prosser. All references to Prosser's 1976 collective bargaining agreement will be to Schneider's Petition for Certiorari (Sch.P.Cert.A.43-76). The 1979 agreement is reproduced in the Joint Appendix at 49-91.

The Trustees complaint alleged that each collective bargaining agreement provided for specific payments to the two trust funds "for each employee covered by said [a]greement." (J.A. 44). They sought: (1) an accounting as to *all* employees of Prosser "covered by the collective bargaining agreement" dating back to March 1, 1976; (2) recovery of all sums of money determined to be due after the completion of the accounting, together with interest thereon; (3) specific performance by Prosser to provide the Trustees with monthly contribution reports; (4) costs attendant to conducting an audit of Prosser's payroll books and records; (5) reasonable attorney's fees; and (6) such other relief as the court deemed just. (J.A.48-49).[3]

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[3] The terms of the Pension Indenture and the Health and Welfare Indenture are identical in every respect pertinent to this case. Only the Pension Indenture is reproduced in the Joint Appendix. (J.A. 14-33). Both Trust Indentures require the employer to make contributions on behalf of its employees as required by the applicable collective bargaining agreement between the union and the employer. (J.A. 15,21). The trust documents define an employee as a person who is: (1) "employed under the terms and conditions of a collective bargaining agreement" and (2) "on whose behalf payments are required by such collective bargaining agreement ... to be made to the Fund by the Employer." (J.A.16).

The trust documents permit the Trustees to obtain from an employer (1) the names, addresses and social security numbers of its "Employees", (2) the hours worked and past employment history, and (3) such other information deemed necessary for the proper administration of the trust. (J.A.22-23).

Further, the trust documents permit the Trustee to "take such steps, including the institution and prosecution of, and intervention in, any legal proceedings as the Trustees in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions or other amounts which may be owed the Trust Fund, without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purpose." (J.A.22).

Prosser, by its answer, denied the Trustees' allegations, particularly their interpretation of provisions of the collective bargaining agreements, and contended the district court lacked subject matter jurisdiction. (J.A.92-93) Prosser moved to dismiss the complaint on grounds that the matters raised by the complaint involved interpretation of various provisions of the underlying collective bargaining agreements and were, therefore, subject to the grievance and arbitration procedure set forth in the agreements[4] (J.A.92-95). Prosser further contended that because the grievance and arbitration procedure had not been undertaken, the court lacked subject matter jurisdiction and the complaint failed to state a claim upon which relief could be granted. (J.A.92,93,95).

Prosser's motion to dismiss was premised on the necessity for interpretation of the collective bargaining agreements in two specific areas: first, the determination of which employees were entitled to participation in the benefit plans for which the Trustees sought contributions; and, second, the scope of the Trustees' administrative authority under the agreements between Prosser and the Union.

On the first issue, the underlying collective bargaining agreements did not require that Prosser make contributions for *all* employees, but only for those determined to be "regular employees" as defined in those contracts. Under the agreements, contributions to the Health and Welfare Fund for "temporary" and "emergency" employees were expressly ex-

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[4] Both collective bargaining agreements provided for grievance and arbitration of disputes between Prosser and the Union or any employee "as to the meaning or application of the provisions of this agreement." (Sch.P.Cert. A.51 & J.A.55). Both agreements provided for a three-step grievance procedure culminating in binding and final arbitration. Under the 1979 agreement, if a dispute arose over Prosser's failure to make contributions to the Trust Funds, the Union could either use its economic power to support its demands or submit its dispute to final and binding arbitration with Prosser. (J.A.56).

cluded (Sch.P.Cert. A.63 & J.A.77), and "temporary", "emergency" and "part-time" employees were excluded from that category of employees for whom contributions to the Pension Fund were required. (Sch.P.Cert. A.65 & J.A.79). The agreements also differentiated casual and seasonal employees from "regular" employees but did not specifically provide whether contributions to the Funds should be made on their behalf. (Sch.P.Cert. A.61 & J.A.61). Prosser asserted that these classifications of its employees required interpretation of the various categories of employment set forth in the collective bargaining agreements and was, therefore, subject to the agreements' grievance and arbitration procedure. (J.A. 93).

Secondly, Prosser also claimed that utilization of the grievance and arbitration procedure was necessary to determine the scope of the Trustees' administrative authority with respect to the following issues raised in the complaint:

(1) Whether the Trustees have the right to demand inspection of the employment records of "all employees covered by the collective bargaining agreements," including those categories of employees for whom contributions are expressly excluded; (J.A.92)

(2) Whether the trustees have the right to seek to recover contributions, and to inspect records, pertaining to the period prior to February 28, 1979, when the Union and Prosser entered into a new collective bargaining agreement in reliance upon their understanding and interpretation of the prior agreement and the manner in which contributions were made pursuant thereto; (J.A.94-95) and

(3) Whether the trustees have the right to seek to recover contributions, and to inspect records, prior to January 4, 1978, since on that date a Union complaint to the National Labor Relations Board, alleging Prosser's refusal to allow an audit of

its records, was dismissed due to the Union's refusal to arbitrate. (J.A.93,94 & 108)[5]

The district court sustained Prosser's motion and dismissed the case without prejudice pending the outcome of arbitration proceedings. (Prosser Pet.Cert. A.51). In its opinion, the court held that the dispute raised in the Trustees' complaint:

> involves the construction and interpretation of the language of the collective bargaining agreements as to which class of employees are covered thereunder and as to the right of each set of plaintiffs to obtain a court-ordered accounting and audit. (Prosser Pet.Cert.44-45)

The court also held:

> that unless and until there has been a determination of the disputes relating to the rights of the plaintiffs and the nature and extent of the defendant's obligations under the collective bargaining agreement, the plaintiffs have no standing to sue as alleged third-party beneficiaries. (Prosser Pet.Cert.45)

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[5] The trustees derived their authority from the following provision in both collective bargaining agreements, which Prosser claimed needed to be interpreted through the grievance and arbitration procedure:

> "By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties ... [hereto] to enter into appropriate trust agreements necessary for the administration of such fund and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such trustees within the scope of their authority." (Sch. Pet. Cert. A.62,64 & J.A.76,78).

Prosser contended that in each of the three instances enumerated above, the Trustees' actions and demands, within the meaning of the foregoing provision, constituted extraordinary matters not "necessary for administration of the fund" and beyond "the scope of their authority."

The district court's decision that litigation of the Trustees' claims must be deferred until the questions of interpretation have been resolved under the grievance and arbitration procedure of the contracts was limited to instances where disputes arising out of an interpretation of the contract language were involved. The court noted that not all collection claims must be processed through the grievance and arbitration procedure and that "*mere* collection matters" are not subject to arbitration. (Prosser Pet.Cert. A.50)

The Trustees of the Pension Fund[6] appealed to the United States Court of Appeals for the Eighth Circuit, which assumed jurisdiction of the appeal pursuant to 28 U.S.C. Sec. 1291. On March 24, 1982, a divided three-judge panel reversed the district court, holding the Trustees could sue without resorting to arbitration. (Prosser Pet.Cert. 27). On April 7, 1982, Prosser filed its petition for rehearing *en banc,* which was granted on June 4, 1982 (A.26). Oral argument was held on October 13, 1982.

On February 16, 1983, the court's *en banc* decision also reversed the district court, with the majority holding that the Trustees did not have to defer their litigation pending arbitration between the Union and Prosser of the underlying contract disputes. (Prosser Pet.Cert. A.1) Senior Circuit Judge Henley wrote a strong dissenting opinion, joined by Judge John R. Gibson. (Prosser Pet.Cert. A.19).

SUMMARY OF ARGUMENT

I. The Central States Southeast and Southwest Areas Pension and Health and Welfare Funds are third-party beneficiaries to the collective bargaining agreement. The Trust Funds take their

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[6] Although the Trustees of both the Pension Fund and the Health and Welfare Fund were the same individuals, only the Trustees of the Pension Fund appealed the decision rendered in favor of Prosser. See notice of appeal Prosser Pet. Cert. at A.41.

rights, duties and obligations subject to the terms of the collective bargaining agreement from which they derive their benefits. The Trustees have filed suit in federal court seeking an audit of Prosser's payroll records kept on *all* employees within the collective bargaining unit. The Trustees' litigation is premised on an interpretation of the collective bargaining agreements. The Trustees' interpretation of the scope of their administrative authority and the breadth of Prosser's obligations under the collective bargaining agreements, is open to legitimate dispute. The collective bargaining agreements unequivocally provide that disputes as to the meaning of the collective agreements will be submitted to the grievance and arbitration procedure for resolution. Arbitration is a condition precedent to the right of the Trustees to bring suit. The failure of the Trustees to exhaust the grievance and arbitration provision of the agreements is a direct defense to the Trustees' action. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960) and *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982).

II. Prosser and the Union are under a congressional mandate to collectively bargain in good faith over the issue of employee benefits. For over two decades, Prosser has made contributions on behalf of its regular employees to the Trust Funds, as required by the collective bargaining agreements. As a part of the continuing collective bargaining process, the Union and Prosser are obligated to police and enforce the terms of the collective bargaining agreement. The Union and Prosser have, in clear terms, reserved for themselves the right to settle disputes regarding the meaning of the collective bargaining agreements by the exclusive use of the grievance and arbitration provision of the contract. The right of the parties to decide for themselves the exclusive method by which disputes will be settled is firmly grounded in congressional command and judicial precedent strongly favoring arbitration of labor disputes. Section 203(d) LMRA, 29 U.S.C. §173(d). *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). Deferral of the Trustees' litigation, pending arbitration of the underlying contract disputes,

will foster industrial peace, preserve the integrity of the collective bargaining process, *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965), and further the goals of judicial economy and restraint. *Barrentine* v. *Arkansas-Best Freight System,* 450 U.S. 728, 746 (1981).

III. The duties and rights of the Trustees to administer the Trust Funds free from the domination and control of the Union and Prosser are certain. Section 302(c)(5) LMRA. The disputes intended to be arbitrated are limited to procedural issues and an interpretation of the categories of employees set forth exclusively in the collective bargaining agreements. Settlement of these disputes is beyond the scope of the Trustees' administrative and fiduciary duties, and poses no threat to the independence of the Trustees. *NLRB* v. *Amax Coal Co.,* 453 U.S. 322 (1981) and *Central States Southeast and Southwest Funds* v. *Central Transport, Inc.,* 698 F.2d 802 (6th Cir. 1983), *petition for cert. filed.* If the Union fails to comply with the requests of the Trustees to arbitrate the disputes, the Trustees will be shielded from liability.

Neither text of the Employee Retirement Income Security Act of 1974, nor the Multiemployer Pension Plan Amendments Act of 1980, or the legislative history indicates an intention of Congress to repeal the labor laws which might be raised as a defense to a proviso in the collective bargaining agreement requiring an employer to contribute to an employee benefit fund. Section 514(d) ERISA, 29 U.S.C. §1144(d)(1975); *Kaiser Steel Corp.* v. *Mullins,* 455 U.S. 72, 88 (1982). Congress did not intend to compromise the integrity of the collective bargaining process, and the attendant right of the parties to settle their disputes under the agreement by arbitration. To the contrary, Congress relies upon the collective bargaining process to expand employee benefits beyond the minimum requirements of the law. Requiring Trustees to defer litigation, pending arbitration of the underlying contract disputes, will foster the continued growth of the private employee benefit system, and give full accord to Congress' intent to leave the collective bargaining process intact.

I. THE EIGHTH CIRCUIT ERRONEOUSLY EXPANDED THE HOLDING OF THIS COURT IN *LEWIS* v. *BENEDICT COAL CORP.* TO PRECLUDE THE DEFENSE OF EXHAUSTION OF CONTRACTUAL REMEDIES.

Employee benefit funds established under Sec. 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5)(1976), are third-party beneficiaries to collective bargaining agreements.

Under general contract law, a third-party beneficiary takes its rights, duties, and obligations subject to the terms of the underlying agreement from which it derives its benefits. *Rotermund* v. *United States Steel,* 474 F.2d 1139 (8th Cir. 1973). Therefore, the promissor may "usually assert against the beneficiary any defense which he could assert against the promissee if the promissee were suing on the contract." Calamari & Perillo, *Contracts,* 623 (2nd ed. 1977) (footnote omitted).

Failure to attempt to exhaust mandatory grievance and arbitration provisions constitutes one such defense to an action brought under Sec. 301 of LMRA, 29 U.S.C. § 185 (1976) for breach of a collective bargaining agreement. *DelCostello* v. *International Brotherhood of Teamsters,* 103 S.Ct. 2281 (1983); *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976); *Vaca* v. *Sipes,* 386 U.S. 171 (1967). Since the decision in this case by the Eighth Circuit Court of Appeals, the status of this defense is in doubt.

In *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin,* 625 F.2d 171 (7th Cir. 1980), a trust fund sued to collect contributions allegedly due from an employer under a collective bargaining agreement. As in the present case, the employer denied that contributions were owed and contended: (1) that the language of the collective bargaining agreement was open to dispute as to which workers were covered by the contribution provisions of the agreement; (2) that the dispute was subject to the broad arbitration provision of the agreement; and (3) that the court therefore lacked subject

matter jurisdiction because of the failure to submit the matter to arbitration.

The Seventh Circuit held that trustees are not required to arbitrate disputes over delinquent payments. But the court found that the case was not a *simple collection* matter. Rather, the case turned on an arbitrable issue of contract interpretation which, until resolved by arbitration, precluded determination of any claimed delinquency. To the trustees' objection that they had no access to the arbitration process, the court responded:

> The argument falls of its own weight, however. To trigger the arbitration process, the Funds need only inform the Union, the members of which the Funds exist to serve, that Martin disputes the coverage of certain workers and ask the Union, the organization of primary interest, to file a grievance against Martin.

Id. at 173

In *Trustees of National Benefit Fund, Etc.* v. *Constant Care Community, Etc.*, 669 F.2d 213 (4th Cir. 1982), the Fourth Circuit adopted the *Howard Martin* analysis. However, the court refused to defer litigation in that case because the employer did not raise any substantive contractual defenses which were subject to resolution by arbitration.[7]

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[7] *Howard Martin* has also been cited with approval by the Ninth Circuit Court, in *Laborers Health and Welfare Trust Fund* v. *Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983). Further, at least one district court has held it appropriate to defer litigation until the collective bargaining disputes are resolved by arbitration. IBEW v. *Dave's Electric Service, Inc.*, 382 F.Supp. 427 (M.D.Fla. 1974), *remanded on other grounds*, 545 F.2d 987 (5th Cir. 1977). Prior to its decision below, the Eighth Circuit had cited *Howard Martin* and *Dave's Electric* with approval in considering issues similar to those involved in the present case. *See Layne-Western Co.* v. *International Union Operating Engineers, AFL-CIO Local Union 513*, 650 F.2d 155, 158 (8th Cir. 1981) and *Farmer* v. *Fisher*, 586 F.2d 1226, 1230 (8th Cir. 1978).

In a divided opinion in the present case, the Eighth Circuit Court of Appeals rejected the *Howard Martin* analysis. The court carved out a significant exception to the right of union and employer to select the method by which disputes as to the meaning of their collective bargaining agreement must be settled. Premised on a perceived need to free trustees from control by both union and employer, the court held that trustees of employee benefit plans may sue an employer without deferring to arbitration, even when the dispute involves issues of contract interpretation. (Prosser Pet.Cert. 2, 19)

The split of authority on this issue begins with diverging opinions on the meaning and breadth of the decision in *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960). In *Lewis,* trustees of a pension fund sued to collect royalties payable under a collective bargaining agreement. The employer defended by alleging a breach of the bargaining agreement due to the union's violation of the no-strike clause, and sought to setoff the resulting damages incurred by the employer against delinquent contributions *admittedly owed* to the trust fund. The Court found: (1) the employer shares an interest in the well being of the trust fund; (2) the setoff could result in higher royalties to innocent employers; (3) the employer had an adequate remedy against the union; and (4) there is a strong congressional policy protecting union members and beneficiaries from damages caused by the actionable wrongs of their union. The Court held that the claims against the union could not be used as a setoff against the amounts owed to the trust funds, absent unequivocal language in the collective bargaining agreement that the union's promise not to strike was a condition precedent to the employer's obligation to make contributions to the trust fund.

Courts which have held that trustees have a right to direct litigation have relied on *Lewis* as the basis for an expanded proposition that, absent unequivocal language to the contrary, trustees are not bound to defer litigation pending arbitration of

the underlying contract disputes.[8] *Lewis,* however, is not dispositive of the issues presented in this case.

IBEW v. *Dave's Electric Service, Inc.,* 382 F.Supp. 427 (M.D.Fla. 1974), held that the arbitration provisions of a collective bargaining agreement were applicable to a trustee's claims for delinquent health and welfare benefit contributions. Judge Hodges examined the reasons given for the decision in *Lewis* and determined:

> the reasons offered by the Court in *Lewis* for rejecting the use of a *substantive* defense or counterclaim in an action by the trustees are not at all applicable to the situation posed here—the use of the *procedural* defense of arbitration. Absent a clear showing of intent to the contrary, the *Lewis* Court would not assume the parties intended to allow certain union action to subvert the trustees' substantial rights under the agreement. *Requiring arbitration, of course, will not subvert any rights* [emphasis added]...The trustees will still have all substantive rights to which they are entitled under the collective bargaining agreement.

Id. at 433.

In *Howard Martin,* the Seventh Circuit also analyzed the holding in *Lewis* and refused to extend it, stating:

> In *Lewis,* however, the employer's liability for payments to the fund was conceded...no arbitration clause was

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[8] *Robbins* v. *Prosser* (A.19) and *Bugher* v. *Consolidated X-Ray Service Corp.,* 705 F.2d 1426 (5th Cir. 1983) *Pet. Cert. pending.* See also, *Boyle* v. *North Atlantic Coal Corp.,* 331 F.Supp. 1107 (W.D.Pa. 1971); *Wishnick* v. *One Stop Food & Liquor Store, Inc.,* 359 F.Supp. 243 (N.D. Ill. 1973); and *Todd* v. *Casemakers, Inc.,* 425 F.Supp. 1375 (N.D.Ill. 1977), which have been frequently cited for the general proposition that trustees need not exhaust the arbitration procedure. However, in these cases it appears that claimed contributions were admitted to be delinquent and there were no questions of contract interpretation for the arbiter to decide.

> present in the contract or discussed by the court. Whether the Funds' special third party status would require a specific provision entitling an employer to set-off payments admittedly owed is irrelevant here, where the existence of the obligation to make certain payments depends upon interpretation of the contract and the contract specifically requires arbitration on questions of interpretation.

625 F.2d at 172.

Until recently, whether *Lewis* was to be read to bar an employer from raising all defenses based on the contract was undecided. In *Kaiser Steel Corp.* v. *Mullins,* 455 U.S. 72 (1982), the Court held that a coal producer, when sued on its promise to contribute to a union welfare fund based on its purchase of coal from producers not under contract with the union, is entitled to plead and have adjudicated the defense that the promise is illegal under the anit-trust and labor laws. The Court rejected the trustees' reliance on *Lewis* as authority for disposing of the issue in the case. The Court reasoned that because: (1) there was strong public policy against enforcing illegal contracts; (2) there was a lack of legislative intent or history to abrogate the defense of illegality; and (3) the defense of illegality related directly to the employer's promise to pay contributions to the trust fund, these defenses could be asserted against the claims of the third-party beneficiary trustees.

Both *Lewis* and *Kaiser* equally support Prosser's position that: (1) the collective bargaining agreements unequivocally state that disputes as to the meaning of the agreement will be submitted to the grievance and arbitration procedure for resolution; (2) arbitration is a condition precedent to the right of third-party beneficiaries to bring suit; and (3) failure to exhaust the grievance and arbitration provision of the agreements is a direct defense to the Trustees' action.

In a collective bargaining agreement, the promise to abide by the grievance procedure is inextricably linked to the substantive

rights and duties promised in the contract. The grievance procedures are part and parcel of the bargaining process upon which the meaning and intent of the parties is determined. In a real sense, the parties' rights and duties are not ascertainable until after the dispute is disposed of by settlement of a grievance or an arbitrator's decision. In this case, unless and until the Union successfully prosecutes the grievance, there is no breach of the contract for which the Trustees can sue. In such cases, arbitration is a condition precedent to suits brought by trustees which are predicated upon an interpretation of the meaning of a collective bargaining agreement. *Lewis, supra.*

In *Kaiser* v. *Mullins,* the Court was concerned by the equity of allowing an employer, who admittedly failed to make contributions, to assert the defense of "illegality" against the benefit fund trustees who were guilty of no wrong doing. Likewise, in *Lewis* v. *Benedict Coal Corp.,* 361 U.S. 459 (1960), the Court was concerned with punishing the innocent trust beneficiaries for the wrongs of the union and therefore the Court refused to allow damages caused by the union to be set off against amounts owed the trust fund.

But the Prosser case does not present any similar problem. The Trustees, as third-party beneficiaries to the collective bargaining agreements, derive their rights and duties from those contracts and the trust instruments. In agreeing to act as trustees, they implied a promise to abide by the terms of the agreements. The Trustees' attempt to litigate disputes without resorting to arbitration is beyond the scope of their authority and is a breach of their promises to the Union and Prosser. The requirement to arbitrate contract disputes is a direct defense to such misconduct by the Trustees.

Most importantly, requiring the Trustees to defer litigation pending arbitration will not subvert the rights of the trust participants and beneficiaries, but will merely "change the initial forum in which those rights are determined to the preferred forum as a matter of national labor policy and the selected

forum by the terms of the agreement itself." *IBEW* v. *Dave's Electric Service, Inc.*, 382 F.Supp. 427, 433 (M.D.Fla. 1974).

II. DEFERRAL TO ARBITRATION IS CONSISTENT WITH THE REQUIREMENTS OF THE COLLECTIVE BARGAINING AGREEMENTS AND THE STRONG NATIONAL POLICY FAVORING ARBITRATION.

A. The Agreements And Conduct Of The Parties Evidence An Intent To Arbitrate.

The Collective Bargaining Agreements:

Under the collective bargaining agreements, the Union is the exclusive bargaining agent for the employees covered by the agreements, and the agreements are declared to be the entire "agreement between the parties as to rates of pay, wages, hours of work, conditions of employment and such other matters", including contributions to the health, welfare and pension funds. (Sch. P. Cert. A. 44-45 & J.A. 51.)

For the life of the agreements, Prosser is obligated to make payments to the Trust Funds in accord with the provisions of the bargaining agreements. The contracts set forth the rate of contributions to the Trust Funds and the obligation to make contributions on behalf of each "regular employee" as defined in the agreements. (Sch. P. Cert. A. 62-65 & J.A. 76-79). Both agreements exclude contributions to the Health and Welfare Fund on behalf of "temporary" or "emergency" employees (Sch. P. Cert. A. 63 & J.A. 77). Comparably, both agreements exclude contributions to the Pension Fund for employees who work less than twenty-five hours per week (with exception for "a regular employee") or who work "part-time, temporarily or in the case of an emergency." (Sch. P. Cert. A. 65 & J.A. 79).

The health and welfare and pension provisions of these agreements further provide that Prosser, by executing the agreements, authorizes its representatives to enter into trust

agreements *necessary for the administration* of the funds and ratifies the actions taken by the Trustees acting "within the scope of their authority." (Sch. P. Cert. A. 62, 64 & J.A. 76, 78). Additionally, Prosser is required to post a roster of regular employees (with dates of their employment) on its billboard at all times (Sch. P. Cert. A.50) and, under the 1979 agreement, is required to send an updated seniority list to the Union every six months. (J.A. 57) If a grievance arises regarding Prosser's duty to make contributions to the Trust Funds on behalf of a specific employee, or if by an independent audit the Union has "reason to believe that the contract has [sic] or is being violated", the Union has a right to inspect payroll records for employees covered by the agreements. (Sch. P. Cert. A.71-72 & J.A. 82-83).

The collective bargaining agreements provide in broad, unequivocal language that "should differences arise between the Company and the Union or an employee of the Company as to the meaning or application of the provisions of this agreement such differences" shall be resolved in accord with the grievance and arbitration provision of the contracts. (Sch. P. Cert. A. 51 & J.A. 55). The 1979 agreement provides, that in the event of a dispute involving Prosser's failure to make contributions to the Trust Funds, the Union, in its discretion, may either use its economic power to support its demands or submit its dispute to final and binding arbitration with Prosser.*

The Trust Indentures:

The Trustees acknowledge receipt of the collective bargaining agreements (J.A. 89), and agree to hold in trust for "employees", the sums of money contributed pursuant to the

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* For the reason that the disputes in this case arose after the termination of the 1976 collective bargaining agreement, the provision set forth in the 1979 agreement for settlement of disputes would most likely be the procedure to be followed by the parties.

"terms" of the collective bargaining agreements. (J.A. 15, 21). An "employee" is defined in the trust agreements as "[a] person who is employed under the terms and conditions of a collective bargaining agreement...and on whose behalf payments are required by such collective bargaining agreement...to be made to the Fund by the Employer" (J.A. 16). The trust agreements allow the Trustees to obtain from contributing employers: (1) the names, addresses and social security numbers of its "employees"; (2) the hours worked by each employee and past industry employment history; and (3) such other information as the Trustees may reasonably require in the administration of the trusts. Further, the Trustees may, by their representatives, examine the pertinent records of each employer whenever the examination is deemed advisable by the Trustees for the proper administration of the trusts. (J.A. 22).

Additionally, the trust indentures purport to grant power to the Trustees to "demand and collect the contributions of the Employers to the Fund" and authorize the Trustees to take such steps, "including the institution and prosecution of, and intervention in, any legal proceedings as the Trustees in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions or other amounts which may be owed to the Trust Fund, *without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purpose.*" (emphasis added) (J.A. 22)

The Agreements Read Together:

It is clear that without the collective bargaining agreements, there would be nothing for the Trustees to enforce against Prosser. Only by referring to the collective bargaining agreements can it be determined what amounts and under what conditions Prosser has agreed to contribute to the Trust Funds. Likewise, the scope of authority of the Trustees to inspect the records of Prosser's "employees" (i.e. a person covered by the collective

bargaining agreements and on whose behalf contributions are to be made) is dependent upon an interpretation of the bargaining agreements.

The agreements must be read in harmony with one another. The Union and Prosser have, in clear terms, reserved for themselves the right to determine disputes about the meaning of the collective bargaining agreements by use of the grievance and arbitration provision of the contracts. The Union is the exclusive bargaining representative of the employees covered by the agreements and Prosser is specifically prohibited from negotiating or making collective bargaining agreements with others. The agreements constitute the entire agreement between the Union and Prosser concerning contributions to the Trust Funds. To allow the Trustees to litigate directly with Prosser the meaning and application of the terms of the collective bargaining agreements, to the exclusion of the Union, is to ignore the plain, unequivocal and mandatory language of the bargaining agreements.

Instead, the agreements must be read to allow the Trustees to proceed with their suit only after the Union and Prosser have had an opportunity to arbitrate the underlying contract disputes. Such an interpretation gives meaning to the provision for arbitration set forth in the collective bargaining agreements and the provision for litigation set forth in the trust agreements.

This interpretation is further buttressed by comparing the unequivocal language of the collective bargaining agreements requiring settlement of disputes by the grievance procedures, with the ambiguous language of the trust agreements, allowing the trustees to institute suit "without prejudice" to the union. "Without prejudice" must be interpreted to mean that the Trustees may not litigate with Prosser, to the exclusion of the Union, the meaning of the collective bargaining agreements, for such litigation would prejudice the Union's position as the exclusive bargaining representative of its members and threatens

its right to have its contract honored. *See, W. R. Grace & Co.* v. *Local Union 759,* 103 S.Ct. 2177 (1983).

The Conduct Of The Parties:

Deferral of trust litigation pending arbitration is consistent with the collective bargaining history and the conduct of the parties. The relationship between Prosser and the Union predates the collective bargaining agreements at issue in this case. Since 1961 Prosser has made contributions to the Pension Funds in accord with the terms of collective bargaining agreements then in effect. For over 20 years the Union and Prosser have bargained in good faith regarding the pension and welfare benefits of employees. Two prior disputes have arisen over Prosser's contributions to the Trust Funds and, in each case, it was the Union, not the Trustees, who claimed the right to enforce the terms of the collective bargaining agreements. (J.A. 99-108).[10]

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[10] On May 26, 1976, the Union filed a lawsuit against Prosser in the United States District, E.D.Mo., Cause No. 76-482(C), claiming Prosser to be delinquent in contributions due the Health & Welfare Fund from March 1, 1973 through February 28, 1976 in an amount not less than $905.65, and delinquent in contributions to the Pension Fund in an amount not less that $977.84. The Union prayed for an audit and accounting of Prosser's books and records. Prosser, without posing any defenses, settled the Union's lawsuit, which was dismissed by the Union without prejudice in September 1976.

The second dispute arose during the life of the 1976 collective bargaining agreement. On April 19, 1977, the Union made a demand upon Prosser for an audit of the company's payroll records to determine if a violation of the contract existed with regard to providing its employees with seniority and other benefits provided by the contract. After Prosser refused the Union's request, the Union filed an unfair labor practice charge with the National Labor Relations Board (NLRB) by reason of the company's refusal to allow an audit of its records. The NLRB deferred ruling on the complaint pending arbitration of the dispute between the Union and Prosser. After the Union informed the NLRB that it did not intend to invoke the contractual provisions providing for arbitration the complaint was dismissed on January 4, 1978. (J.A. 99-108).

B. Arbitration Of The Underlying Contract Disputes Is Consistent With The Strong National Labor Policy Favoring Arbitration.

The intent of the parties to submit contract disputes to arbitration is consistent with the national labor policy stated by Congress and developed by the federal courts.

The federal policy favoring arbitration to resolve labor disputes is firmly grounded in congressional command. Section 203(d) of the Labor Management Relations Act, 1947, (LMRA) 29 U.S.C. Sec. 173(d), provides in part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. (A.1)

As a matter of federal labor policy, arbitration is encouraged as a positive mechanism to foster peaceful industrial relations. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). As stated by the Court in *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. at 584-585:

> In the absence of an express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.

The Eighth Circuit Court of Appeals majority implies that because the Trustees were non signatories to the collective bargaining agreement they never contracted to arbitrate the disputes. While it is true that the Trustees were non signatories, it can hardly be argued that the Trustees, as third-party

beneficiaries to the collective bargaining contracts, did not accede to the agreements of the Union and Prosser to exclusively settle their contract disputes by arbitration. *cf. John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964).

More critical, however, is the Court of Appeals majority's suggestion that arbitration of the contract disputes in this case cannot be justified on the basis of the traditional reasoning which supports the strong national labor policy favoring arbitration. On this point, Judge Henley responded, in his dissent:

> Today the court makes bad law...and erodes the pronouncements of the Supreme Court in the *Steelworkers Trilogy.* Its decision may be perceived as doing disservice to the national policies of maintaining industrial peace, avoiding delay and deferring to the expertise of persons acquainted with industry standards and the law of the shop. (footnotes omitted, Prosser Pet.Cert.A.20).

Arbitration is strongly favored because it is a mechanism to foster stability in industrial relations. As noted by the majority below, "[t]he arbitration and the 'no strike' clause are generally each *quid pro quo* for the other." (Prosser Pet.Cert. A.7). The court, without deciding, appears to accept an argument previously advanced by the Trustees: that because the Trustees cannot call for a strike, actions by the Trustees will in no way disrupt industrial peace. The question of whether the Trustees can call a strike is not the issue, however.[11]

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[11] While it is true that Trustees do not have authority to call a strike, it is naive to think their actions will not have an influence on the Union. *See, e.g., Layne-Western Co.* v. *International Union Operating Engineers,* 650 F.2d 155 (8th Cir. 1981), where after an audit by the trustees, the trustees brought suit to collect the claimed delinquencies and the union went out on strike. The court held the union was required to arbitrate with the company the underlying contract disputes which were raised in the trustees' suit. Reversed by *Robbins* v. *Prosser.* (Prosser Pet. Cert. A.2).

The question of industrial peace is much larger and more subtle than the question of strikes. It is the entire collective bargaining process, of which arbitration is part and parcel, that contributes t industrial stability. *Steelworkers* v. *Warrior & Gulf Nav. Co., supra.* The test for industrial peace is whether the dispute will substantially affect further relationships between the employer and the employees. The Trustees seek to deprive the Union and Prosser of their statutory and contractual right to establish a uniform and exclusive method for settling their disputes. A rule permitting the Trustees to litigate directly with Prosser, to the exclusion of the Union, will "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements". *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, 653, (1965), quoting from *Local 174, Teamsters etc.* v. *Lucas Flour Co.,* 369 U.S. 95, 103 (1962).

If arbitration is required to interpret a collective bargaining agreement for certain purposes but not for others, the Union and Prosser could easily be subjected to inconsistent or conflicting obligations owed to one another under the agreement. The Court of Appeals panel majority, while acknowledging the dangers of these inconsistencies, dismissed them as minimal. (Prosser Pet. Cert. A.35). This assumption exposes employers such as Prosser to grave risk. In light of the Court's holding in *W.R. Grace & Co.* v. *Local Union 759, etc.,* 103 S.Ct. 2177 (1983), it is clear that if the Trustees are allowed to proceed without deferring the matter to arbitration, Prosser will be forced to litigate these disputes at its own risk, while, whatever the outcome, the Union's right to arbitrate the same dispute will remain intact. *Id.* at 2186.

As noted by Judge Henley in his dissent:

> One need not be clairvoyant to forsee that the spirit of negotiation and compromise that forms the basis for such agreements might be seriously compromised if the parties become aware that the terms of the agreements might be

> safely ignored or interpreted initially other than through the arbitration machinery. (Prosser Pet. Cert.A.23).

Clearly, Prosser would be unwise to enter into a collective bargaining agreement which exposes the company to such dangers.

Industrial peace will also be served by deferring to the expertise of an arbitrator familiar with the "law of the shop". The disputes to be arbitrated in this case[12] are typical labor disputes involving procedural and coverage issues under the contract.[13] They are well suited for arbitration. The arbitrator will be called upon to determine whether an employee is "part-time", "temporary" or "emergency" in light of the contract provisions, previous bargaining history of the parties, and the custom and practice of the moving and storage industry. *See Transportation-Communication Employees Union* v. *Pacific Railroad Co.*, 385 U.S. 157, 160-61 (1966) and *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-597 (1960).

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[12] The issues to be arbitrated by Prosser and the Union are set forth at 6 supra.

[13] Courts have traditionally held that the procedural questions presented by Prosser are arbitrable: *See, e.g., International Union of Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972), (issue of whether union was barred by laches from enforcing the collective bargaining agreement, held arbitrable); *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 557 (1964), (holding that "procedural questions which grow out of the dispute and bear upon its final disposition should be left to the arbitrator"); *Bressette* v. *International Talc Co.*, 527 F.2d 211 (2d Cir. 1975), (factual issue of intent of the parties to include or exclude arbitration of obligations under the separate pension plan, held to require arbitration); *Local 542 International Union of Operating Engineers* v. *Penn State Construction, Inc.*, 356 F.Supp. 512 (M.D. Pa. 1973), (issue of alleged union waiver of right to arbitration, held arbitrable); *General Warehousemen and Employees Union 636* v. *American Hardware Supply*, 329 F.2d 789 (3rd Cir.1964), (issue of union's waiver of arbitration, on account of late filing and receipt of severance pay for its members, held proper subject for arbitration).

(footnote continued on next page)

The arbitrator will determine whether or not contributions are owed, not under the law, but rather under the terms of the collective bargaining agreements, which are more liberal than the requirements of the law.[14] An arbitrator familiar with the custom and practice of the moving and storage industry will be able to efficiently, expeditiously and properly determine on whose behalf Prosser has agreed to make contributions. (Prosser Pet. Cert. A. 22, Henley & Gibson, JJ., dissenting). *See, e.g. Gateway Coal Company* v. *United Mine Workers of America,* 414 U.S. 368, 377-379 (1974).

(footnote 13 continued)

Likewise, courts have held disputes involving employee benefits arbitrable. *See, e.g., United Steelworkers* v. *General Steel Industries,* 499 F.2d 215 (8th Cir. 1974), (status of employees and their rights to benefits under the separate insurance and pension plans, held to require arbitration); *Builders Ass'n. of Kansas City* v. *Greater Kansas City Labor D.C.,* 326 F.2d 867 (8th Cir. 1972), (impasse over the terms to be included in the trust agreement, held to require arbitration); *United Steelworkers* v. *Mesker Bros. Industries, Inc.,* 457 F.2d 91 (8th Cir. 1972), (procedural questions, along with disputes as to the adequateness of insurance coverage, held to be arbitrable); *United Steelworkers* v. *Crane Co.,* 456 F.Supp. 385 (W.D.Pa.1978), (dispute over apportionment between two employers, of pension contribution amounts due on behalf of an employee as provided by ERISA, held to require arbitration); *United Rubber C.L. & P.W. Local 102* v. *Lee Rubber and Tire Corp.,* 394 F.2d 362 (3rd Cir. 1968), (issue of whether payments to fund by employer were still required during strike, held arbitrable).

[14] The Employee Retirement Income Security Act of 1974, as amended (ERISA) requires that an employee who has satisfied the one year service requirement (a twelve month period during which the employee has completed 1,000 hours of service, Sec.202(a)(3)(A) ERISA) commence participation in the *plan* no later than the earlier of (a) the first day of the first plan year beginning after the date on which he satisfied such requirements or (b) the date six months after the date on which he satisfied those requirements. Sec.202(a)(4)(A)&(B) ERISA, 29 U.S.C. §1052. *ERISA*, thus permits the exclusion of any employee who completes less than 1,000 hours of service during the twelve month period measured from his employment commencement date. The service requirement for contributions to the Pension Plan under the 1979 collective bargaining agreement here is 30 cumulative days of service within a 90 day period. (J.A.60).

(footnote continued on next page)

Arbitration will also achieve the objectives of judicial economy and restraint, by either resolving a party's grievance or by settling underlying factual disputes prior to the district court taking jurisdiction to enforce the rights of the Trustees. *See Barrentine* v. *Arkansas-Best Freight System,* 450 U.S. 728, 746-753 (1981) dissent. Burger, C.J. joined by Rehnquist, J.[13]

The Court of Appeals decision, if allowed to stand, has far reaching and serious consequences to the district courts who will have to hear these cases. During oral argument before the district court, counsel for the Trustees stated that he had filed some eighty cases on behalf of the Trust Funds in the Eastern

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(footnote 14 continued)

The employee then becomes a participant in the Pension Plan (if still employed) 180 days after the first day he became employed. (J.A. 78). As applied to the 1979 collective bargaining agreement, ERISA permits the exclusion of "part time", "temporary" or "emergency" employees. (J.A.79). Applying the generous definition of a regular employee [defined in terms of service requirements] the arbitrator in considering the "law of the shop" and the intent of the parties as to who are "part time", "temporary" or "emergency" employees cannot reach a decision which would violate any ERISA right of an employee included in the collective bargaining unit.

Obviously, the same is true with regard to disputes over contributions to the Health and Welfare Plan, for it is not subject to participation and vesting rules created by ERISA. Sec. 201 of ERISA, 29 U.S.C. §1051.

[13] The "... federal courts [are] flooded by litigation increasing in volume, in length, and in a variety of novel forms..." *Barrentine,* 450 at 748. In the two years that have lapsed since *Barrentine,* this flood has continued. Civil cases filed in 1981 increased to 180,576, up 7% from 1980. In 1982 the record was set at 206,193, up 14.2% from 1981. The number of cases per judge has increased dramatically. In 1960, the ratio was 242:1, in 1980, 327:1, in 1981, 350:1 and in 1982, 400:1. The number of cases pending in the district courts has continued to grow. As of June 30, 1982, there were 205,434 civil cases pending, an 8.9% increase from the previous 12 month period. Most importantly, the number of cases filed under the labor statutes rose 10%, from 9300 in 1981 to 10,288 in 1982. Annual Report of the Director, Administrative Office of U.S. Courts 3-4 (1982). Compare with *Barrentine,* 450 at 748 n.1.

District of Missouri alone, each involving alleged delinquent contributions and presenting questions of interpretation of the underlying bargaining agreements. One may presume a similar number of cases have been filed by these and other trustees representing multiemployer funds throughout the country.

Given the typical nature of the disputes in this case, it cannot be said that the interest of the parties, or the judicial system, will best be served by "employing the cumbersome, time-consuming, and expensive process of litigation" in the federal courts when there exists the reasonable alternative of arbitration. *Barrentine, Id.* at 748.

III. DEFERRAL TO ARBITRATION IS CONSISTENT WITH CONGRESSIONAL INTENT AND THE NATIONAL EMPLOYEE BENEFIT POLICY.

The prior discussions establish that the opinion of the Eighth Circuit is contrary to the traditional precepts of contract law and would seriously undermine national labor policy supporting arbitration. The Court of Appeals recognized these problems, but took the position that the rights and responsibilities of fiduciaries were of greater concern. The opinion effectively subordinated the policy considerations of federal labor law to what the court perceived to be the conflicting and superior dictates of national policy in the field of pension and health and welfare regulation. This portion of the brief will focus on that policy, and the statutes in which the policy is expressed, to demonstrate that no such conflict exists. There is, in short, no contrary statutory or policy consideration which overcomes the duty to arbitrate.

A. No Fiduciary Duty Will Be Compromised By Deferral To Arbitration.

Trustees of employee benefit funds are primarily charged to administer such funds for the sole benefit of participants and beneficiaries. This principle is found in Sec. 302(c)(5)LMRA, 29

U.S.C. §186(c)(5) (1978 & Supp. 1983), the Employee Retirement Income Security Act of 1974 (ERISA), the Multiemployer Pension Plan Amendments Act of 1980, (MPPAA), and the Court's decision in *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981). This statutory and common law fiduciary duty, however, does not warrant the conclusion that the attempt of the Trustees in this case to litigate the meaning and application of the collective bargaining agreement is within the scope of their administrative duties.

In *Amax Coal Co.*, the Court rejected the employer's contention that management-appointed trustees (Sec. 302(c)(5) LMRA) were the representatives of the employer for "purposes of collective bargaining or adjustment of grievances", within the meaning of Sec.8(b)(1)(B) NLRA as amended by LMRA, 29 U.S.C. §158(b)(1)(B) (1973). Unlike unions and employers, trustees simply do not engage in collective bargaining and adjustment of grievances. Pertinent to defining the scope of trustees' duties, the Court stated:

> The management-appointed and union-appointed trustees do not bargain with each other to set the terms of the employer-employee contract; they neither require employer contributions not required by the original collectively-bargained contract, nor compromise the claims of the union or the employer with regard to the latter's contributions. Rather, the trustees operate under a detailed written agreement, 29 U.S.C. §186(c)(5)(B), which is itself the product of bargaining between the representatives of the employees and those of the employer.

Id. at 336.

Under *Amax Coal Co.*, it is clear that to allow trustees the right to initiate litigation without submitting underlying collective bargaining disputes to arbitration would significantly expand their authority beyond that allowed by statute or by the bargaining agreements.

Other indications of the limits of trust administration can be found in cases brought by fund trustees seeking court appointment of an umpire to break a deadlock between the employer and employee trustees in the administration of Sec. 302(c)(5) LMRA employee benefit plans. Four Circuit Courts of Appeals have considered what constitutes trust administration deadlock.

The Second Circuit has interpreted administration to include all issues which the trustees have authority under the trust agreement to decide. *Mahoney* v. *Fisher,* 277 F.2d 5 (2d Cir. 1960); *Barrett* v. *Miller,* 276 F.2d 429 (2d Cir. 1960); and *Singleton* v. *Abramson,* 336 F.Supp. 754 (S.D.N.Y. 1971).

The Tenth Circuit has held that administration is limited to the practical and ordinary matters of day to day administration of the plans. *See, Ader* v. *Hughes,* 570 F.2d 303 (10th Cir. 1978), holding the decision to amend the plan is not a matter of ordinary trust administration, and *Bath* v. *Pixler,* 283 F.Supp. 632 (D.Col. 1968), holding the decision to terminate the plan is a legal controversy and not a dispute over practical administration of the plan.

The Ninth Circuit has decided the issue on a case by case basis. In *Hawkins* v. *Bennett,* 704 F.2d 1157 (9th Cir. 1983), the court determined that it was appropriate to appoint an umpire to resolve a dispute among the trustees involving whether to increase benefits under the trust plan, finding the dispute to be a matter within their trust administrative authority.

Finally, the Eighth Circuit, in *Farmer* v. *Fisher,* 586 F.2d 1226 (8th Cir. 1978),[16] reversed the district court's order appointing an arbiter to break a trustee deadlock over whether to sue an employer for failing to make contributions to the funds while the union was on strike. In reaching its decision, the court first noted that the refusal of the employer to make contributions

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[16] *Overruled by the Court of* Appeals majority in its opinion below. (Prosser Pet. Cert. A.1).

was the event giving rise to the dispute. The court found the issue of whether contributions were owed depended on interpretation of the collective bargaining agreement which (as in the present case) specified the sums and criteria for payment. While noting that the mere origination of a dispute in the collective bargaining agreements does not, in every case, preclude its characterization as a matter of trust administration, the court held that disputes involving the interpretation of the collective bargaining agreement fall into the category of extraordinary matters not intended to be included in trust fund administration. *Farmer* v. *Fisher* is factually analogous to the present case, and its reasoning is applicable here.

Even if the Court were to adopt the broad definition of trust administration as applied by the Second Circuit, the result would be the same. Looking only at the trust documents, it cannot be reasonably argued that the trustees have authority to seek an audit and contributions on behalf of *all* of Prosser's employees working in the collective bargaining unit where the trust documents themselves do not provide such broad authority.

The Trustees in their complaint allege that Prosser had breached the terms of the trust and collective bargaining agreements by failing to allow the Trustees to conduct a "proper audit." (J.A. 46) The Trustees prayed that an "account be taken as to *all* employees of Defendant covered by the Collective Bargaining Agreement, ... covering the periods for which the collective bargaining agreements are effective." (J.A. 48, emphasis added).

The limitation on the power of the Trustees to conduct an audit under these very trust documents was decided by the Eighth Circuit in *Central States Southeast and Southwest Funds* v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981).[17] In that case the

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[17] Overruled by the Court of Appeals majority in its opinion below. (Prosser Pet. Cert. A.1).

trustees asserted a similar right to inspect all the records of CRST's employees, including employees not covered by the bargaining agreement. As in the instant case, the trust document limited the trustees' authority to audit records kept on those employees (1) covered by the collective bargaining agreement and (2) upon whose behalf the employer is required to make contributions. (J.A. 16 & 22). The court refused to rewrite the agreement to provide a greater right of inspection than that specifically allowed under the trust indentures, holding:

> ERISA does not expand the right of inspection beyond that contractually agreed to. The fiduciary obligations mandated by ERISA are owed only to participants and beneficiaries. 29 U.S.C. §1104. Participants are those employees who are or who may become eligible to receive a benefit from an employee benefit plan. 29 U.S.C. §1002 (7). Non-covered employees, that is, those employees who are not "employed under the terms and conditions of a Collective Bargaining Agreement" neither are nor can be participants or beneficiaries. The district court correctly held that employee coverage is to be determined solely under the provisions of the collective bargaining agreements. Absent such determination, the Funds have no right, express or implied, to have access for audit purposes to *all* employee records. [footnote omitted]

641 F.2d at 619.

A similar conclusion was reached in *Central States Southeast and Southwest Funds* v. *Central Transport Inc.*, 698 F.2d 802 (6th Cir. 1983), *petition for cert. pndg.* The court, again reviewing the same trust documents as in this case, held that the agreements did not authorize the trustees to inspect the records of all employees. The trustees were only authorized to audit the records of "covered" employees and the records of particular employees whom the trustees had reasonable cause to believe were "covered" by the collective bargaining agreement. The court held that the trustees' decision to audit the records of all

employees was arbitrary, capricious and, therefore, beyond the scope of their administrative duties.

As in *CRST* and *Central Transport,* the Trustees, on the face of these trust agreements, are not entitled to the relief sought in their complaint. If the Trustees have a right greater than that provided for in the trust instruments, it is not derived from the law, but from an interpretation and application of the collective bargaining agreements. Deferral to arbitration of the Trustees' claimed right to a broader audit will in no way compromise the right of the Trustees to remain independent of the Union or Prosser. Even the Union's refusal to arbitrate will not deprive the Trustees of the rights conferred on them by the trust agreements.

The opinion of the Court of Appeals majority in this case makes the assumption that trustees have a fiduciary duty to litigate disputes, even those involving collective bargaining questions. It concludes that these Trustees, therefore, must have the right to initiate litigation. According to the court's reasoning, holding trustees liable for benefits to persons for whom no contributions were made would place trustees in an untenable position if they had to rely on the union to arbitrate their rights.

To reach this conclusion the majority cites the case of *Rosen* v. *Hotel and Restaurant Employees,* 637 F.2d 592 (3rd Cir. 1981). Rosen, a retired employee, sued his union and pension fund for pension benefits under a collective bargaining agreement. The fund refused Rosen's request for benefits, stating he did not have the required years of credited service because his employer failed to make contributions for some years of his employment. The Third Circuit held that Rosen was entitled to a pension because the trustees breached their fiduciary duty by not notifying him that his pension was in jeopardy due to his employer's failure to make contributions. The court held that the union and the trustees were under a fiduciary duty to take some action against the employer who failed to contribute to the fund, such as commencement of a suit or picketing a non-contributing employer.

The Eighth Circuit contrasted this liability of trustees with the limitation on direct initiation of litigation in *Howard Martin,* 625 F.2d 171 (7th Cir. 1980), and concluded: "...[i]t seems that the trustees of Taft-Hartley pension funds are in danger of being whipsawed by the decisions in *Rosen* and *Howard Martin.* In the Third Circuit they are under a probable duty to sue for delinquent contributions, and in the Seventh Circuit they are prevented from doing so in many cases." (Prosser Pet.Cert. A. 16).

The concern expressed by the Eighth Circuit is not borne out by an analysis of the cases, however. The *Rosen* holding is completely compatible with the *Howard Martin* analysis permitting suits by trustees in "simple collection actions". In *Rosen,* the employer's duty to contribute to the pension fund was undisputed and, thus, a "simple collection action" which could be maintained by the trustees without deferring to the union to prosecute a grievance.

Furthermore, any concern for the trustees being "whipsawed" by having to defer litigation to arbitration as envisioned in *Howard Martin* is allayed by the holding in *Adams* v. *Gould, Inc.,* 687 F.2d 27 (3rd Cir. 1982). In *Adams,* employees sued their employer claiming a breach of the pension plan and the trustees claiming a breach of fiduciary duty. The Third Circuit dismissed the complaint and held that previous arbitration and settlement of the same disputes between the employer and the union under the provisions of the collective bargaining agreement were binding on the employees and that the issues could not be relitigated by suit against the employer and/or trustees. Thus, as applied to the present case, if the Union and Prosser resolve the underlying contract disputes by adherence to the grievance and arbitration procedure, the Trustees will be insulated from that liability which troubled the Eighth Circuit and lead to the decision now before the Court.

The Trustees have no independent right to invoke the arbitration provisions under the collective bargaining agreements. The district court acknowledged this fact and adopted the procedures suggested in *Howard Martin*: the Trustees need only inform the Union and ask it to file a grievance against Prosser in order to resolve these disputes.

The Eighth Circuit Court of Appeals majority questioned whether the Union will act readily at the request of the Trustees. The court reasoned that, because the Union may not arbitrate claims perceived by the Trustees to be a breach of the collective bargaining agreements, the Trustees should have a right to initiate litigation. (Prosser Pet. Cert. 16-18). The fear that the Union will not pursue the underlying pension and welfare contribution claims when requested is pure speculation. It is a factual issue which cannot be resolved by the record in this case because the Trustees have not made any such request. Unless and until the Trustees ask the Union to act, it cannot be said that the grievance and arbitration provision of the collective bargaining agreements is inadequate to settle the disputes and protect the interest of the Trustees. *Republic Steel Corp.* v. *Maddox*,. 379 U.S. 650, 653 (1965); *Vaca* v. *Sipes*, 386 U.S. 171, 184 (1967).[11]

If the Union is requested and decides to arbitrate the dispute, it cannot be presumed that it will do so in a perfunctory or negligent manner. It must be presumed that the Union will faithfully carry out its statutory duty of fair representation and its duty to enforce the terms of the collective bargaining agreement. *Vaca* v. *Sipes, supra; Humphrey* v. *Moore*, 375 U.S. 335 (1964). To presume otherwise seriously undermines the national labor policy placing confidence in the union to fairly represent

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[11] The Trustees have not suggested nor pled that it would be futile to request the Union to arbitrate the disputes. *See, e.g., Glover* v. *St. Louis-San Francisco Railway Company*, 393 U.S. 324 (1969).

its members. Neither the history of the labor movement, nor the actions of the Union in this case warrant such a radical presumption.

In addition to the fact that the Union has a primary interest and purpose in enforcing the terms of the collective bargaining agreement, the Union is under a "statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca* v. *Sipes, supra* at 177. Should the Union refuse to "take an arguably meritorious pension and welfare claim" to arbitration, in our litigious society, it would most certainly expose itself to a claim of unfair representation and substantial liability. *See, e.g., Bowen* v. *United States Postal Service,* 103 S.Ct. 588 (1983). By exposing both the Union and Prosser to costly litigation and substantial liability, pressure is placed on the parties to make full use of the contractual provisions for settling disputes by arbitration. *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976).

Should the Union refuse to arbitrate, or do so in a perfunctory or negligent manner, the interests of the Trustees and the Funds, and the beneficiaries, are adequately protected by their right to sue. Additionally, if there is any reasonable basis for believing that Prosser has failed to report or contribute for any covered employee, the Trustees can seek the assistance of the Secretary of Labor to investigate and make findings available to the Trustees. Sec. 504 ERISA, 29 U.S.C. §§1134(A)(1) & (2) (1975). Further, criminal sanctions are available should the employer knowingly fail to disclose facts required by ERISA to be published or certified to the administrator of the trust plans. 18 U.S.C. §1027; *Central States Southeast and Southwest Funds* v. *CRST,* 641 F.2d 616 (8th Cir. 1981).

The Trustees' interests are also protected by the reasonable expectations of the law. The law does not command trustees to bring suit or take other action which is neither within the scope

of their authority nor reasonable or prudent. *Central States Southeast and Southwest Funds* v. *Central Transport,* 698 F.2d 802, 806 (6th Cir. 1983). While a trustee is exposed to liability for failing to act with care, skill, prudence and diligence, its actions are not a matter of strict liability. The law will review the conduct of the trustee to determine only if it is arbitrary or capricious. *See, e.g. Bueneman* v. *Central States Southeast and Southwest Funds,* 572 F.2d 1208 (8th Cir. 1978). Even in the event the Trustees are unsuccessful in compelling the Union to prosecute these arbitral disputes, the Trustees shall have acted with due care, skill, prudence and diligence. Clearly, then, the Trustees could not be held liable for failing to fulfill their fiduciary duties.

B. Deferral To Arbitration Complements The Goals Of ERISA.

From the 1940's to the mid-1970's private pension and welfare plans flourished in the United States.[19] Aware of the achievements of the private pension system, Congress sought to encourage its healthy growth. After years of consideration and debate, Congress passed the Employee Retirement Income Security Act of 1974, (ERISA) 29 U.S.C. §§1001-1381 (1975). Congress set forth the purpose of the Act as follows:

> It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with

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[19] In 1974, Congress estimated that the number of employees covered by pension plans was between 23 and 30 million, as compared to 9.8 million in 1950, and 4 million in 1940. It was estimated that by 1980 the number would climb to 42.3 million. H.R.Rep.No. 93-807, 93 Cong., 2d Sess. 9, *reprinted in* [1974] U.S.Code Cong. & Ad. News 4670, 4678.

> respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Sec. 2(b) ERISA, 1974, 29 U.S.C. §1001(b) (1975). (A.3)

Congress sought to protect the interests of employees and beneficiaries not by establishing a guaranteed right to benefits nor by regulating the collective bargaining process, but by setting minimum standards assuring the equitable character of the plans and regulating the administration of employee benefit funds.

Pursuant to the National Labor Relations Act (NLRA), the union is charged with the duty to collectively represent its members in bargaining "...in respect to rates of pay, wages, hours of employment or other conditions of employment...." Sec. 9(a) NLRA, 29 U.S.C. §159(a) (1973). Employee benefits have been held to be "mandatory" subjects of bargaining, falling within the statutory command to negotiate "wages" and "conditions of employment". Sec. 8(a)(5), NLRA, 29 U.S.C. §158(a)(5); *Inland Steel Company* v. *NLRB,* 170 F.2d 247 (7th Cir. 1948); *cf. Allied Chem. Workers* v. *Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971).

ERISA left undisturbed this duty of labor and management to bargain regarding employee benefits. Doing so was not simply a reaffirmation that the interests of the union worker were adequately protected by the requirement of the NLRA for the union and employer to bargain in good faith with respect to

employee benefits.[20] But, further, this forebearance by Congress was recognition of the fact that, if not tampered with, the collective bargaining process would promote the expansion of employee benefits beyond the minimum requirements set forth in ERISA. Thereby, Congress' purpose of encouraging the growth and maintenance of the private employee benefit system would be achieved and, at the same time, the purpose of the labor laws to foster good faith bargaining and peaceful resolution of disputes would be accommodated.

The duties of the parties to abide by the terms of the collective bargaining agreement and police the enforcement of its terms are explicit. In the event of disagreement as to the meaning and application of the agreement, the parties, necessarily, have the corollary right to agree upon an exclusive method for the settlement of such disputes. Sec. 203(d) LMRA, 29 U.S.C. §173(d) (1978); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). It would be an anomaly for Congress to have intended that the union and employer bargain for employee benefits, and, at the same time, deprive the union and employer the right to settle disputes over the meaning of their bargain during the term of the agreement.

There is nothing in either the legislative history, or the statute itself, to indicate an intent by Congress to abrogate the right of the union and employer to bargain collectively and contractual-

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[20] Section 1011(b)(2) of ERISA, 26 U.S.C. §410(b)(3), provides for the exclusion of union members in determining whether a pension plan for other employees of the same employer meets the minimum participation standards of the law. Congress explained the reason for the exclusion of union members was to relieve a hardship created on non-union employees. Congress recognized the inherent protections of the collective bargaining process to guard against discriminatory treatment of union members and left to the discretion of bargaining representatives the decision whether to bargain for pension benefits or current compensation. H.R.Rep.No.93-807, 93 Cong. 2d Sess. 44-45, Reprinted in [1974] U.S.Code Cong. & Ad. News 4670, 4714-4715.

ly bind all parties to a method by which disputes as to the meaning of the agreement are to be resolved.

To the contrary, Section 514(d) of ERISA, 29 U.S.C. §1144(d) (1975) declares:

> Nothing in this [Act] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States...or any rule or regulation issued under any such law.(A.5)

Clearly, ERISA did not alter, amend, or impair the National Labor Relations Act, the Labor Management Relations Act, or any common law rule or federal labor policy developed by the judiciary.

The Trustees have sued Prosser, claiming a breach of the collective bargaining agreements. In doing so, they assert a right to initiate direct litigation, despite the agreement by the parties to settle the type of interpretative disputes raised in the Trustees' complaint by arbitration. The Trustees claim a right to circumvent the terms of the contracts, and vitiate the promises of the parties, by alleging district court jurisdiction under Sec. 502 (a)(3) of ERISA, 29 U.S.C. §1132(a)(3)(1975). That section provides:

> (a) a civil action may be brought—
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> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan. (A.3)

The Trustees' complaint charges violations of both the collective bargaining agreements and duties under the trust indentures. It contains no allegations that Prosser violated any provi-

sion of ERISA. The district court deferred litigation on the claimed violations of the trust indentures, finding those claims to be inseparable from the claims relating to Prosser's breach of the collective bargaining agreements. The court properly exercised its discretion by deferring all litigation pending the resolution of the underlying contract disputes between Prosser and the Union. The court's order was reasonable because it assured the orderly, efficient and proper handling of the Trustees' claims.

ERISA's legislative history is silent on the requirement that trustees defer to the rights of the union and employer to interpret the collective bargaining agreement by arbitration. Congress, in its Joint Explanation Statement on ERISA, referred only to the authority of participants and beneficiaries to enforce their rights against the trustees. H.R.Rep. No. 93-1280, 93d Cong., 2d Sess. 326-27, *reprinted in* [1974] U.S.Code Cong. & Ad. News 5038, 5106-5107. Likewise, the right of "ready access to the Federal courts" refers only to the rights of participants and beneficiaries. Sec. 2(b), ERISA, 29 U.S.C. §1001(b) (1975).

The text of ERISA does not mention the doctrine of exhaustion of contractual remedies as a condition precedent to institution of suit. However, in enacting ERISA Congress "intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 *Cong. Rec.* 29942 (1974) (remarks of Sen. Javits). Further, the intent was that actions brought under Sec. 502 "are to be regarded as arising under the laws of the United States in similar fashion to those brought under Section 301 of the Labor-Management Relations Act of 1947." H.R.Rep. No. 93-1280, 93d Cong., 2d Sess. 258 & 327, *reprinted in* [1974] U.S.Code Cong. & Ad. News 4639, 5038 & 5107.

Congress' reference to Section 301 of the LMRA has been judicially interpreted to mean that Congress intended that beneficiaries and participants seeking enforcement of their rights under Section 502 of ERISA must first exhaust intra-

contractual remedies.[21] *See, e.g., Kross* v. *Western Electric Co.*, 701 F.2d 1238 (7th Cir. 1983); *Challenger* v. *Local Union No. 1 of International Bridge*, 619 F.2d 645 (7th Cir. 1980); *Amato* v. *Bernard*, 618 F.2d 559 (9th Cir. 1980); *Adams* v. *N. J. Brewery Employees' Pension Trust Fund, etc.*, 670 F.2d 387 (3rd Cir. 1982); *Air Line Pilots Assn.* v. *Northwest Airlines*, 627 F.2d 272 (D.C. Cir. 1980). The right of the Trustees to sue on behalf of participants and beneficiaries is no greater than the rights of the participants and beneficiaries to bring suit on their own behalf. Thus, a rule requiring the Trustees to await suit pending arbitration of the underlying collective bargaining disputes will not frustrate the intent and purpose of ERISA.

The decision of the Court of Appeals majority allows the Trustees to bypass arbitration, and litigate directly with Prosser the meaning of the collective bargaining agreements. This decision frustrates the intent of Congress to allow the bargaining parties to resolve contract disputes exclusively by the method chosen by the parties. It threatens the efficacy of the collective

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[21] The rule requiring beneficiaries and participants to exhaust contractual remedies prior to instituting suit under Sec. 502, is further premised on the reasoning that: (1) the procedure will reduce frivolous lawsuits; (2) it will promote consistent treatment of claims; (3) it will promote a non-adversarial method of claims settlement; and (4) it will minimize the costs of claims settlement for all concerned. *See, e.g., Amato* v. *Bernard*, 618 F.2d 559, 567 (9th Cir. 1980)

This rationale is equally applicable to a rule requiring arbitration in cases of disputes involving contract interpretation prior to bringing suit by trustees under Sec. 502 of ERISA. As above, (1) the union and employer will sift out frivolous claims based on misinterpretation of the collective bargaining agreement by trustees; (2) the union and employer will be able to settle on an interpretation of the agreement which will be binding on all parties; (3) arbitration will promote a peaceful method for dispute settlement; and (4) the settlement of contract disputes by arbitration will minimize the costs to all parties and possibly save the funds from having to pay the costs and the employer's attorney fees if unsuccessful in their litigation. Sec. 502(g)(1) ERISA, 29 U.S.C. §1132(g)(1), as amended, 1980.

bargaining process, and undermines the intent of Congress to foster the growth of multiemployer pension plans, in particular. See, Sections (3)(c)(2) and (3)(c)(3) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1001a(c)(2) & (3) (Supp. 1983). *See also, NLRB* v. *Amax Coal,* 453 U.S. 322 (1981). These disastrous results cannot be justified by the requirement to protect the Trustees and the Funds from the control of the union and employer when, as in this case, the disputes to be settled involve eligibility conditions which far exceed the minimum requirements of ERISA and are contained in the collective bargaining agreements. *See, United Mine Workers of America Health & Retirement Funds* v. *Robinson,* 455 U.S. 562 (1982).

In sum, reversal of the Court of Appeals majority decision in this case will produce the following results: (1) it will preserve the rights of the employer and the union under LMRA Sec. 203(d) to arbitrate and resolve the underlying contractual disputes in accord with the collective bargaining agreement; (2) it will properly define the role of trustees in administering Sec. 302(c)(5) LMRA benefit funds; and (3) it will complement the intent Congress expressed in ERISA to promote employee benefit funds.

C. Nothing In The Multiemployer Pension Plan Amendments Act Conflicts With Deferral To Arbitration.

Approximately six months after the filing of the Trustees' complaint, the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) became law. The Act added Section 515 to ERISA, 29 U.S.C. §1145, which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement. (A.5)

The Court of Appeals majority relied on Section 515 and quoted, from the decision in *Kaiser Steel Corp.* v. *Mullins,* 455 U.S. 72 (1982), a passage from the legislative history of the new section:

> The provision which was eventually enacted as [§515] was added to S. 1076 by the Senate Committee on Labor and Human Resources. The Committee explained that the provision was added because "simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to contributions," and steps must be taken to "simplify delinquency collection." Senate Committee on Labor and Human Resources, S. 1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess., 44 (Comm. Print, Apr. 1980) (1980 Senate Labor Committee Print) (emphasis added). During floor debate, Senator Williams and Representative Thompson explained the purpose and meaning of [§515] in the same language used in the Senate Labor Committee Print.

Id. at 87. (Prosser Pet.Cert. A.12-13)

The Court of Appeals was struck by the reference to the phrase "simple collection actions" in the legislative history and the use of the term in the *Howard Martin* case. The suggestion in the Eighth Circuit's decision that Congress implicitly disapproved of the *Howard Martin* decision is inaccurate, for the Committee action occurred before *Howard Martin* was decided. Had Congress disapproved the reasoning of *IBEW* v. *Dave's Electric Service, Inc.,* 382 F.Supp. 427 (M.D.Fla. 1974), or referred favorably to *Wishnick* v. *One Stop Food & Liquor Store, Inc.,* 359 F.Supp. 239 (N.D.Ill. 1973), then the Court of Appeals might have been on more solid ground. However, not one of the cases cited by the legislators, approvingly or otherwise, dealt with the issue of exhaustion of the grievance and ar-

bitration provision of a collective bargaining agreement before instituting suit.[22]

Section 515 does not govern the present case. The Trustees' suit is not a simple action brought to collect delinquencies. The Trustees do not assert that delinquencies exist. They seek, instead, an accounting for all employees from 1976 through 1982, regardless of whether any contribution was required on behalf of all such employees. They, thereby, raise issues which require an interpretation of the collective bargaining agreements. The district court sought to simplify the Trustees' claims by deferring to the expertise of an arbitrator to determine the collective bargaining disputes. The order of dismissal was completely compatible with the objectives of Sec. 515.

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[22] The following cases were cited with approval:

Lewis v. *Benedict Coal Corp.*, 361 U.S. 459 (1960), holding an employer has no right to set off damages (caused by the union's breach of the contract) against contributions admittedly owed to the trust funds, in the absence of unequivocal language to the contrary; *Lewis* v. *Mills Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962), holding that an employer could not defend against a trustees' suit for contributions to the trust fund based upon failure of consideration resulting from the trustees' misconduct; and *Huge* v. *Long Hauling Company, Inc.*, 590 F.2d 457 (3rd Cir. 1978), precluding the employer from raising an anti-trust defense to trustees' request for preliminary injunction.

The following cases were cited with disapproval:

Western Washington Laborers Employees Health and Security Trust Fund v. *McDowell*, 103 LRRM 2219 (W.D.Wash. 1979) and *Washington Area Carpenters Welfare Fund, et al.* v. *Overhead Door Co.*, 488 F.Supp. 816 (D.C.Wash. 1980), holding an employer was allowed to defend against a trustees' suit for collection of delinquent contributions on the basis of alleged unenforceability of a pre-hire agreement. *Carpenters Welfare Fund, etc., Id., rev'd on other grounds,* 681 F.2d 1 (D.C. Cir. 1982).

The collective bargaining agreements require the prompt resolution of disputes involving the meaning and application of the contracts, and arbitration will generally result in resolution of the disputes more promptly than rushing to the crowded courtroom.[23] *Central States Southeast and Southwest Areas Pension Fund* v. *Howard Martin,* 625 F.2d 171, 173 (7th Cir. 1980) Use of arbitration not only respects the rights of the parties to agree upon an exclusive remedy to resolve their disputes, it also simplifies collection suits brought by trustees by narrowing the issues to be litigated. In many cases, arbitration can settle the claims of trustees and a law suit would then be unnecessary.

Even assuming Sec. 515 is applicable and relevant to the present case, neither its text nor its legislative history suggests that the Trustees are permitted to institute suit against Prosser and circumvent the arbitration requirement of the collective bargaining agreement. Section 515 did not repeal "...the labor laws, and any other statute which might be raised as a defense to a provision in the collective bargaining agreement requiring an employer to contribute to a pension fund...and nowhere in the legislative history is there any mention that [§515] might conflict with other laws." *Kaiser Steel Corp.* v. *Mullins,* 455 U.S. 72, 88 (1982). As analyzed by Justice White, Rep. Thompson and Sen. Williams "...did not say that employers should be prevented from raising all defenses; rather, they spoke in terms of 'unrelated' and 'extraneous' defenses." *Id.*

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[23] Under the 1979-1982 collective bargaining agreement, for example, the decision to arbitrate a dispute will be made within forty-four days of the filing date of the grievance. (J.A. 55-56).

CONCLUSION

For the above stated reasons, petitioner respectfully requests that the Court reverse and vacate the order of the Court of Appeals for the Eighth Circuit, and reinstate the order of the District Court dismissing the complaint without prejudice.

Respectfully submitted,

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November 22, 1983

APPENDIX

APPENDIX

STATUTES INVOLVED

Act of June 23, 1947, 61 Stat. 153, Section 203(d), 29 U.S.C. §173(d).

Functions of Service

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

* * *

Act of June 23, 1947, 61 Stat. 156, Section 301(a), 29 U.S.C. §185(a).

Suits by and against labor organizations
Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

Act of June 23, 1947, 61 Stat. 157, as amended, Sec. 302(c)(5) 29 U.S.C. §186(c)(5).

Restrictions on financial transactions

(c) Exceptions

The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such

payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . .

Act of Sept. 2, 1974, 88 Stat. 832, as amended, Section 2(b), 29 U.S.C. §1001(b).

Congressional findings and declaration of policy

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

* * *

Act of Sept. 2, 1974, 88 Stat. 891, Section 502 as amended by an Act of Sept. 26, 1980, 94 Stat. 1295, Section 306(b), 29 U.S.C. §1132.

Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

. . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

. . .

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

Act ofSept. 2, 1974, 88 Stat. 897, as amended, Section 514(d), 29 U.S.C. §1144(d).

Other laws

. . .

Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of the title) or any rule or regulation issued under any such law.

Act of Sept. 26, 1980, 94 Stat. 1295, Section 515, 29 U.S.C. §1145.

Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

NOS. 82-1860 and 82-1862

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

SCHNEIDER MOVING & STORAGE COMPANY, PETITIONER,
AND
PROSSER'S MOVING AND STORAGE COMPANY, PETITIONER,

v.

LORAN W. ROBBINS, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER PROSSER'S MOVING AND STORAGE COMPANY'S
MOTION TO DIVIDE AND EXTEND THE TIME FOR ORAL ARGUMENT

Comes now Petitioner Prosser's Moving and Storage Company, by Charles W. Bobinette, counsel of record, pursuant to U.S. Sup. Ct. Rule 38 and in support of its Motion states:

1. On October 3, 1983, the Court entered the following order in the above-captioned causes:

> "The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument."

2. Petitioners Schneider Moving & Storage Company (hereinafter Schneider) (82-1860) and Prosser's Moving and Storage Company (hereinafter Prosser) (82-1862) raise the same legal question for review: May trustees of multiemployer employee benefit funds sue an employer for breach of the collective bargaining agreement before exhausting the mandatory grievance and arbitration procedure set forth in the agreement where (1) the claims of the trustees raise questions as to the meaning and application of the agreement, and (2) the agreement requires that such claims be resolved through the grievance and arbitration procedure. The petitioners, however, raise the question in different factual settings:

A. Prosser remains a party to a current collective bargaining agreement, while in Schneider the union is decertified as the representative of Schneider's employees; and

B. Prosser disputes the claimed right of Respondent Trustees to inspect records kept on all of its employees, while in Schneider the company submitted to a broad inspection of its records.

Counsel for each petitioner is best suited to answer questions which may be posed during oral argument relating to the facts unique to their respective petitions.

3. Throughout the litigation, petitioners have been represented by separate counsel. At different times the parties have discussed the possibility of proceeding collectively. In each instance it was determined that, because of the factual differences between the two cases, one counsel could not represent both petitioners without creating a conflict of interest.

4. Despite the good faith efforts of counsel for petitioners, they have not been able to agree upon a method by which both petitioners' interests can be adequately represented if only one counsel is permitted to argue on behalf of both petitioners.

5. To avoid this conflict of interest, and the appearance of impropriety, counsel for Prosser suggests that it is proper to permit petitioners to divide their oral argument and to allot petitioners an additional ten (10) minutes, for a total of forty (40) minutes, in order to adequately present the oral argument to the Court.

6. Prosser's counsel is advised that Schneider has filed a similar motion to divide and extend the time for oral argument. In the event that said Motions are granted, counsel for petitioners will coordinate their efforts to avoid repetitious arguments.

WHEREFORE, Petitioner Prosser's Moving and Storage Company, prays this Honorable Court to grant its Motion for permission to

divide the petitioner's oral argument and allot petitioners a total of forty (40) minutes for oral argument.

Respectfully submitted,

Charles W. Bobinette
Counsel of Record for Petitioner
Prosser's Moving and Storage Company
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St. Louis, Missouri 63101
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AFFIDAVIT OF SERVICE

I, Charles W. Bobinette, being first duly sworn, state upon my oath, that on the 5th day of December, 1983, a true copy of the foregoing Motion was served on all counsel of record in this proceeding by depositing three (3) copies thereof in the United States Mail, postage prepaid, and addressed to:

Russell N. Luplow, Esq. Counsel for Respondents
505 Woodward Avenue - Suite 3400
Bloomfield Hills, Michigan 48013

David F. Yates, Esq., Counsel for
Schneider Moving & Storage Co.
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STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

Subscribed and sworn to before me this 5 day of December, 1983.

Notary Public

My commission expires:

ALAN B. WEBER
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES DEC. 18, 1985
ST. LOUIS COUNTY

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

NOS. 82-1860 and 82-1862

In the

Supreme Court of the United States

October Term, 1982

SCHNEIDER MOVING AND STORAGE COMPANY,
Petitioner,

and

PROSSER'S MOVING AND STORAGE COMPANY,
Petitioner,

vs.

LORAN W. ROBBINS, et al., TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Since they are not parties to the collective bargaining agreement and do not have direct access to its grievance mechanisms, may the trustees of employee benefit funds, as fiduciaries under ERISA and as third-party beneficiaries of the labor agreement, proceed directly to court to collect delinquent contributions and to compel audits of contributing employers' records even though these employers allege that their disputes with the funds require interpretation of the collective bargaining agreement and therefore prior arbitration?

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NOS. 82-1860 and 82-1862

In the

Supreme Court of the United States

October Term, 1982

SCHNEIDER MOVING AND STORAGE COMPANY,
Petitioner,

and

PROSSER'S MOVING AND STORAGE COMPANY,
Petitioner,

vs.

LORAN W. ROBBINS,[1] et al., TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' CONSOLIDATED BRIEF

RESPONDENTS' STATEMENT OF THE CASE

Petitioners are public movers operating in and around St. Louis, Missouri. Respondents are the Trustees of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, two of the largest Taft-Hartley multiemployer benefit funds in the United States. For all times relevant to the underlying lawsuits, Prosser and Schneider were parties to collective bargaining agreements with Local

[1] Respondents are. Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley, and R.V. Pulliam, Sr., Trustees of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds. Thomas F. O'Malley has been replaced by Arthur H. Bunte, Jr. Earl L. Jennings, Jr. is also a Trustee.

610, affiliated with the International Brotherhood of Teamsters. These agreements required Petitioners to make specified weekly contributions to the Funds on behalf of all persons covered by the agreements (Sch. Pet. for Cert., A 62-65; J.A. 6-8; 43-45; 76-79).[2]

These collective bargaining agreements incorporated the Trust Agreements governing the Central States Funds by reference (Sch. Pet. for Cert., A 62-64; J.A. 76-79). Articles III, Sections 4 and 5 of the Trust Agreements expressly authorize the Trustees to initiate judicial proceedings to collect delinquent contributions and to audit contributing employers' "pertinent records" (J.A. 22-23).

In March, 1977, and again in May, 1979, Central States conducted an audit of Schneider and rebilled the company. On both occasions, Schneider ignored the audit findings and the Funds' rebilling, contending that the company had paid what it thought it owed.[3] In April, 1980, the Trustees filed an action

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[2] Article I of the collective bargaining agreement "covers" *only* those employees in the four job classifications included in the bargaining unit which Local 610 represents: truck drivers, warehousemen, packers, and helpers (Sch. Pet. for Cert., A-45; J.A. 51). These "covered" employees may be "regulars," "seasonals," "casuals" or employees hired on a "temporary," "emergency" or "part-time" basis. Whether an employee falls into any one of these categories depends on such factors as when he was hired (e.g., "seasonal"), whether he has a regular job elsewhere (e.g., "part-time"); whether he passed the probationary period ("regular"), the understanding or circumstances under which he was hired (e.g., "temporary," "casual," "emergency"); how regularly he, *in fact*, worked ("casual"). The pension and health and welfare provisions of the collective bargaining agreement entitle only some of these employees to contributions (Sch. Pet. for Cert., A 49-51; 61-65; J.A. 57-61; 76-79). Contrary to Schneider's contention (p. 3 of Brief), there *is* a correlation between the level of benefits and contribution rates. The Funds offer the negotiating parties a schedule of benefits that specific rates can provide; the union and the employer then select the one they can afford.

[3] F. Schneider, the Company's President, admitted on deposition that a prior audit had taken place in 1977 and that the Funds had rebilled the Company. His deposition reads as follows (p. 16, ln. 25; p. 17, ln. 1-15):

> Q. Did you have an audit sometime in '77 by the Central States?
> A. Right.
> Q. And what were the results of the audit?
> A. It was stupid.
> Defendant's attorney: Answer the question as best you can.

(Footnote 3 continued on page 3.)

to collect the delinquencies assessed against the company. Schneider filed a Motion to Dismiss on the grounds that the alleged delinquencies sought to be collected involved employees who were not covered by the collective bargaining agreement, and that the Trustees had no standing to bring the action until the contract was interpreted through the appropriate grievance mechanism.[4]

The collective bargaining agreements did not permit *the Trustees* to invoke the grievance clause, notwithstanding the fact that problems of interpretation might be involved in a claim against the company. Nor could the employer invoke it (Sch. Pet. for Cert., 51-53).[5] Nevertheless, nothing in the

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(Footnote 3 continued from page 2.)

A. What do you mean the audit, what was the result?
Q. Did they rebill you?
A. They kept rebilling all the time.
Q. Well, did they send you a statement saying you owe more money?
A. They sent us a statement saying we owed them more than we thought.
Q. Did you ever pay that?
A. I paid them for what I thought I owed them.
Q. So partial payment pertaining to their estimate?
A. I paid them what I thought I owed them and that was it.

When asked whether, pursuant to the 1979 audit, the Funds sent another bill, Mr. Schneider responded: "I don't know. I guess they did. I don't know. I don't pay any attention to it." (Dep. F. Schneider, p. 18, ln. 5-6) (Appellants' Brief, pp. 17-18).

[4] Mr. Schneider contended that he employed only two classes of employees: "regulars" and "extras" (J.A. 39). Hence, the gravamen of the dispute between Schneider and the Funds was whether any of these "extras" could be classified in one of the above-described categories and hence be entitled to contributions. The issue before the Eighth Circuit and thus before this Court is *solely* in *what forum* this dispute should be resolved. The Appendix to Schneider's Brief has no bearing on this issue. Respondents have always conceded that the collective bargaining agreement contained ambiguities, but that these ambiguities were within the competence of federal courts to resolve.

[5] The grievance procedure was applicable only: "should differences arise between the *Company and the Union* or *any employee of the Company as to the meaning or application of the provisions of the agreement*" (A-51, emphasis supplied). Moreover, failure to comply with the pension and health and welfare provisions of the collective bargaining agreement exposed the employer to economic action by the union upon five days' notice (Article XXI, Sch. Pet. for Cert, A-72). (This was also true of Prosser's contracts, except that the 1979-1982 collective bargaining agreement also permitted the employer to request arbitration of appropriate grievances (J.A. 56).

record indicated that Schneider had ever attempted to discuss its "coverage" problems with the Union although "coverage" disputes with the Trustees existed since the first audit.

Only the Union could set the grievance mechanism in motion. Significantly, by the time Schneider filed a Motion to Dismiss the Trustees' collection action on account of their failure to exhaust intracontractual remedies, the Union had already been decertified for more than a year; moreover, the collective bargaining agreement had expired.[6]

The gravamen of the Trustees' Complaint against Prosser was that Prosser refused to permit an audit of the company's "pertinent records" as specified in the Trust Agreements. Although Prosser's collective bargaining agreement expressly incorporated the Trust Agreements by reference (J.A. 76-79), the company contended that the scope of the Trustees' administrative authority, as applied to it, required contractual interpretation. Hence prior submission to arbitration was necessary.[7]

The district court decided the *Schneider* and the *Prosser* cases on the same date, making no distinction between matters involving trust administration, as set forth in the operative Trust Agreements, and matters related to bargainable issues, such as coverage under the collective bargaining agreements. It therefore dismissed both Trustee actions for the same failure to exhaust intracontractual mechanisms, notwithstanding the fact that the Trustees could not invoke the grievance mechanism of the collective bargaining agreement themselves and notwithstanding the fact that Prosser and Schneider were bound by the Trust Agreements which expressly provided that actions taken by the Trustees were independent of any actions

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[6] In a deposition, F. Schneider stated that a decertification election was held in August, 1979 (p. 13, ln. 25). (*See* Appellants' Brief, pp. 17-20.) The expiration date of the last contract to which Schneider was bound was February 28, 1979 (Sch. Pet. for Cert., A 73-74).

[7] Both the Joint Appendix and Prosser's Brief contain materials and arguments related to a transaction before the NLRB involving Prosser and the Union. The Trustees and the Funds were not involved in these transactions and they are not related to the *choice of forum question* at bar.

taken by the Union (Prosser's Pet. for Cert., A 41-51; Brief, pp. 6-7).[8]

Recognizing that the Trustees would be dependent on the Union to invoke the grievance clause on their behalf, and that this would be inconsistent with national pension policy and recent decisions of this Court, a panel of the court of appeals reversed (A 27-39). Following a rehearing *en banc*, the court affirmed the panel decision by a majority of 6-2 (A 2-25).

SUMMARY OF ARGUMENT

I. A. Arbitration as a federally preferred method for resolving disputes arising out of labor agreements has always been examined in the *context* in which a request for this forum has been made. Where the parties have included grievance clauses in their contracts and the alternative to arbitration was industrial strife, arbitration has been compelled even in the face of a countervailing statute. *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970, Norris-LaGuardia Act); *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368 (1974, *Federal Coal Mine Health and Safety Act*). Conversely, arbitration was regarded as an inappropriate forum for the ultimate vindication of individual statutory rights even though these rights paralleled those contained in a collective bargaining agreement and even where an employee had pursued his contractual claim through the grievance procedure. *Alexander* v. *Gardner-Denver, Inc.*, 415 U.S. 36 (1974, Title VII); *Barrentine* v. *Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981, FLSA).

In the *context* at bar, *judicial* imposition of an arbitral forum in the absence of a contractual agreement or a statutory mandate is not appropriate. ERISA has preempted the field of pension law. Audit and collection actions are comprehended within the statute as core fiduciary obligations. Neither ERISA nor the Trust Agreements governing the Funds (mandated by the statute) contemplate the exhaustion of the grievance mechanisms of a contributing employer's collective bar-

[8] All further references to decisions of the courts below will be cited to the Prosser Appendix to its Petition for Certiorari.

gaining agreement merely because a dispute arises between the employer and the Trustees requiring its interpretation. The incorporation by reference of the Trust Agreements into the collective bargaining agreement does not transform matters of trust administration into typical "labor disputes" subject to arbitration. Moreover, in exercising *their statutory obligations*, Respondents are protecting *the statutory rights* of 500,000 Fund participants and beneficiaries, many of whom are not part of the bargaining unit and are owed no duty of fair representation by the union (e.g., retirees, dependents and their families). Thus, the role of arbitration in the context of Trustee actions to enforce claims of benefit plans requires accommodation of principles of labor and trust law in light of the identity of the parties, the issues involved, the statutory framework in which the issues have arisen, and the absence of a need to preserve industrial peace.

I. B. The principles enunciated in the *Steelworkers Trilogy* militate against imposing arbitration upon Respondents: they did not *agree* to this forum; have no *direct* access to it; and cannot derive any "therapeutic" value from the processing of patently "frivolous" claims.

Under *Steelworkers'* principles, courts would have no authority to weigh the merits of an employer's claim; hence, for practical purposes dismissal would be routine and federal courts would be ousted of the jurisdiction expressly conferred by Congress (29 U.S.C. §§ 1001(b), 1132(e), 1145). Moreover, trustees stand entirely outside of the collective bargaining process and cannot either prevent industrial strife or promote labor peace. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981).

I. C. In *Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960), this Court determined that fund trustees are uniquely situated third-party beneficiaries. In the interests of protecting the solvency of welfare funds and the expectancies of their beneficiaries, the Court refused to apply commercial third-party beneficiary law and allow a substantive defense to be raised against the trustees which a promisor (employer) could raise in a contract action by a promisee (union). This reasoning has been and should be expanded to include the procedural defense of exhaustion. Congress intended that fund trustees

should have access to the procedural safeguards of a judicial forum as well as a forum which provides for the greatest possible consistency, finality, and review through the application of such principles as *stare decisis, res judicata,* and collateral estoppel. Congress specifically endorsed *Lewis* v. *Benedict* in enacting the Multiemployer Pension Plan Amendments Act of 1980 (Pub. L. No. 96-364); it also sought to narrow the defenses available to an employer resisting a fund collection action. *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), did not repudiate the principles of *Lewis;* the Court merely refused to enforce illegal contracts notwithstanding the admittedly special status of third-party beneficiary trustees.

In enacting Section 301(a) of the LMRA, Congress clearly believed that federal courts were competent to resolve disputes arising out of collective bargaining agreements. Hence, the submission of contract disputes to a federal court is not tantamount to undermining the union's status as exclusive bargaining representative or expanding the employer's obligations contrary to his intent.

II. Mandatory deferral to the grievance/arbitration procedures of a collective bargaining agreement which the Trustees *cannot invoke directly* and which require the union's efforts on their behalf vitiates the separateness between trust funds and unions mandated by Congress in enacting Section 302(c)(5) of the LMRA and the principles of nondelegability embodied in ERISA (29 U.S.C. § 1105). The union has no duty of fair representation to the Trustees and the Trustees have no statutory or contractual method of compelling the union to act on their behalf. The Eighth Circuit recognized that mandatory deferral could raise serious conflicts of interest and that unions might lack incentive to prosecute grievances benefiting retirees, particularly where this might jeopardize the jobs of active unit members. This would be particularly true if, as in the case at bar, the union was decertified. The Fifth and Third Circuits expressly endorsed this reasoning. *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983); *Trustees of Local 478 Pension Fund, et al.* v. *Siemens*, No. 82-5719, 114 L.R.R.M. 3401 (3d Cir. Nov. 18, 1983).

III. Where Congress has addressed itself to arbitration, it has spoken directly (*see* 29 U.S.C. § 186(c)(5)(B) of the

LMRA, arbitration of trustee deadlocks; 29 U.S.C. § 1401 of ERISA, arbitration of disputes concerning employer withdrawal liability). There is nothing in the legislative history or the text of ERISA contemplating anything *but* direct access by federal fiduciaries to federal courts in enforcing claims on behalf of trust plans. The legislative history and text of MPPAA give rise to a positive inference that the arbitration of trustee collection actions was not envisioned, particularly since this would not "simplify delinquency collections" and the arbitrator would not have the authority to impose the new and mandatory statutory remedies (double interest, liquidated damages, costs and attorney fees).

IV. Employers generally report and contribute to multiemployer funds on the basis of an honor system. Respondents' audits are designed to verify the accuracy of reporting and to deter evasion. The contractual and statutory bases for the right to audit are, respectively, Article III, Section 5, sentence 2 of the Trust Agreements governing the Funds and 29 U.S.C. § 1104 of ERISA (the "prudent man" rule). The scope of an audit is not arbitrable; the employer's remedy is to seek a *judicial* review of the Trustees' demand for records and obtain a determination that it is arbitrary and capricious.

ARGUMENT

I. NEITHER NATIONAL LABOR POLICY NOR NATIONAL PENSION POLICY REQUIRES COMPULSORY ARBITRATION

I. A. Arbitration must always be considered in the context in which it is requested; mandatory deferral of trustee audit and collection actions is inimical to sound trust administration

The existence of a strong federal interest in encouraging the rapid disposition of industrial disputes through contractually agreed-upon grievance procedures is beyond question. However, the issue that was presented to the Court of Appeals for the Eighth Circuit, and is now before this Court, is whether this interest is so overriding that it requires the *judicial imposition* of an arbitral forum on the trustees of employee benefit funds without any *statutory or contractual*

basis for such compulsion and *solely* because disputes with contributing employers have arisen which require or are claimed to require the interpretation of collective bargaining agreements and hence traditional application of the "law of the shop."

The role of arbitration in the developing law of labor relations has been frequently analyzed by this Court. The fact that a particular dispute has implicated a collective bargaining agreement or required its interpretation has never been in and of itself dispositive. Rather, the Court has consistently taken pains to analyze the *context* in which a federal preference for arbitration was asserted, focusing on the specific issues involved as well as the identity of the adversaries, in light of the ultimate goal of promoting industrial peace in the given circumstances. Since arbitration is only one of a number of possible methods for resolving labor disputes, several questions have always required resolution before access to a judicial forum has been *denied*: first, have the *parties to a contract* agreed to submit *any* dispute to an arbitrator; second, have the parties agreed to submit a *particular* dispute to arbitration; third, are statutory as well as contractual rights in dispute; fourth, if statutory rights are involved, can they be adequately addressed by an arbitrator or would some other forum (such as the NLRB or a court) be better equipped to frame an appropriate remedy; fifth, is arbitration actually required to promote industrial peace.

In this regard, a few landmark decisions will be noted at the outset of this discussion to illustrate the point that arbitration as a preferred labor policy does not exist in a vacuum, is not a judicial clichē, and has not been universally mandated by this Court in situations where, despite the existence of a grievance/arbitration clause in a collective bargaining agreement, there remained a need to accommodate competing national policies reflected in statutes serving differing interests.

I. A. 1. Arbitration is preferable to industrial strife

In *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), a conflict arose between policies underlying the Taft-Hartley Act (29 U.S.C. § 141, *et seq.*, 1947) and

the Norris-LaGuardia Act (29 U.S.C. § 101, *et seq.*, 1932), which required an evaluation of the competing statutes in their historical setting, judicial accommodation, and ultimate resolution in favor of arbitration. The facts were simple. Frozen food in a supermarket had been shelved by a supervisor and his crew in derogation of work reserved by the collective bargaining agreement for bargaining unit members. The union demanded that the shelves be stripped and the food replaced by them. When the employer refused to permit this, the union struck and picketed the store although the dispute was covered by a grievance/arbitration clause. The employer sought injunctive relief and specific performance of the no-strike clause in state court. The state court issued a TRO. The union removed the action to federal district court in an attempt to quash the TRO. The district court granted the employer's motion to compel arbitration and enjoin the strike and picketing, believing the issue to be arbitrable under the grievance clause and thus specifically enforceable under 301(a) of the LMRA. An appeal followed. Relying on *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), the Ninth Circuit reversed the district court's order on the grounds that *federal courts* (as opposed to state courts) were precluded by the Norris-LaGuardia Act from enjoining strikes and picketing arising out of a labor dispute.

This Court granted review, recognizing that its *Sinclair* ruling could lead to anomalous results. First, state courts would for all practical purposes be ousted of jurisdiction to hear actions based upon the breach of collective bargaining agreements, although Congress intended, in enacting Section 301(a) of the LMRA, that federal substantive law would be fashioned from national labor policy concurrently by state and federal courts. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957). Unions, however, sued by employers to enforce arbitration and no-strike agreements in *state* courts, would routinely remove the action to *federal* courts in order to gain the protection of the anti-injunction provision of the Norris-LaGuardia Act. This in turn would reduce the incentive of employers to enter into agreements containing such clauses since they could not be enforced by the most efficacious means: injunctions for their breach.

The Court therefore took *an historical look* at the relevant statutes, noting that the earlier Norris-LaGuardia Act had been passed to strengthen the ability of the then nascent labor movement to engage in legitimate concerted activity in an effort to achieve equality of bargaining power, activity which courts had previously thwarted as if in alliance with management interests. With the passage of the NLRA [Wagner] in 1935 (29 U.S.C. § 151, *et seq.*) and the LMRA [Taft-Hartley] in 1947 (29 U.S.C. § 141, *et seq.*), however, Congressional emphasis had shifted from strengthening the *economic power* of labor unions toward encouraging techniques for collective *bargaining* and the peaceful resolution of industrial disputes.

In order to promote the federal preference for arbitration as a method for resolving labor disputes (as enunciated in the *Steelworkers Trilogy*) and *also to protect state court jurisdiction for contract actions cognizable under Section 301(a) of the LMRA*, the Court overruled its Sinclair decision and declared that "the literal terms of § 4 of the Norris-LaGuardia Act *must be accommodated to the subsequently enacted provisions of 301(a) of the Labor Management Relations Act and the purposes of arbitration*" (p. 250, emphasis supplied). The holding was limited to those situations in which a dispute was covered by a *mandatory* grievance/arbitration clause *and* a traditional balancing of the equities favored granting injunctive relief to prevent irreparable harm to the employer from the effects of a continuing strike.

In *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368 (1974), a conflict arose which required this Court to resolve the issue of whether occupational safety disputes were excluded as a class from the judicial presumption in favor of arbitration as a matter of public policy. The conflict was generated by a coal mine operator's reinstatement of two foremen who had falsified certain safety records required by federal and state law. The district court enjoined the strike and ordered immediate arbitration. To assuage the union's fears regarding mine safety, the court also ordered suspension of the two foremen pending the outcome of arbitration. Notwithstanding the existence of a binding grievance/arbitration clause covering local disputes of "any kind," the Third Circuit reversed, deciding that safety disputes were qualitatively diffe-

rent from disputes over economic matters such as wages, should be treated as *sui generis*, and should not be subject to binding arbitration as a matter of public policy. Justice Douglas, in a strong dissenting opinion, stated that disputes concerning mine safety had been preempted by Congress which, in 1969, had enacted the Federal Coal Mine Health and Safety Act (30 U.S.C. § 801, *et seq.*) with a comprehensive scheme of administrative controls: "The 1969 Act specifies the arms of the law which handle these matters of safety of mines. Congress has given arbiters no share of the power" (p. 394). Nevertheless, a majority of this Court found that the Act did *not* reveal a Congressional intent to preempt all other methods of resolving any type of mine safety dispute, that Respondent itself had not made such a contention, that the company's reinstatement of two mine foremen was clearly a "local matter" and subject to the contract's grievance clause, that the union had an implied duty not to strike considering the breadth of the arbitration clause, and that the district court had correctly applied *Boys Markets*.

I. A. 2. This Court has held that arbitration is a comparatively inappropriate forum in which to vindicate statutory rights

While *Boys Markets* and *Gateway* dealt with the propriety of compelling arbitration against a statutory background addressing different, if not conflicting, purposes where the alternative was *in fact industrial strife*, two subsequent cases, *Alexander* v. *Gardner-Denver, Inc.*, 415 U.S. 36 (1974), and *Barrentine* v. *Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981), rejected *the exclusivity of the arbitral forum* where an employee challenged individual statutory rights.

i. Approval of the right to vindicate Title VII claims in a federal court

In *Alexander* v. *Gardner-Denver, supra*, a black employee who had been hired initially as a low level maintenance worker and then promoted to the position of trainee drill operator was subsequently discharged for producing too many defective parts. (Although the union itself did not offer this evidence at the arbitration hearing, testimony was brought forth to the effect that white employees similarly situated were

transferred back to their original positions or otherwise disciplined but not discharged for the same offense.) The collective bargaining agreement in question prohibited discrimination along the lines of Title VII and the grievance/arbitration clause covered discriminatory discharges. However, the arbitrator was limited to interpreting the contract. The union pursued Alexander's grievance through arbitration, but the arbitrator found that he had been discharged for just cause. Prior to the arbitration award, Alexander had filed a charge of racial discrimination with the Colorado Civil Rights Commission, which referred it to the EEOC. At this time, Alexander claimed that he could not "rely" on the union. The EEOC, however, failed to find reasonable cause to believe Title VII had been violated. Nevertheless, Alexander was advised of his right to file suit in federal district court. Both the district court and the Court of Appeals for the Tenth Circuit held that since the employee had voluntarily elected to pursue his claim of racially-motivated discharge through the grievance/arbitration mechanism of the collective bargaining agreement, he was *precluded* from suing under Title VII. This Court, in a unanimous decision, reversed.

Finding issues of racial discrimination in the employment arena to be of the highest priority and analyzing the legislative history of Title VII (42 U.S.C. § 2000, *et seq.*), the Court found, *inter alia*, that Congress had given the federal courts plenary powers to enforce statutory rights; that Title VII rights were absolute and not subject to waiver or abridgement through the majoritarian principles that govern the collective bargaining process; that while the law supplemented rather than supplanted existing laws and institutions so that discrimination claims could be pursued in parallel forums (for example, in arbitration proceedings or in proceedings before the NLRB), the principles of preclusion or deferral or election of remedies were not applicable to Title VII claims; that arbitration was designed to vindicate *contractual* rather than *statutory* rights; that this arbitrator in particular was limited to interpreting the contract "in accordance with the industrial common law of the shop and the various needs and desires of the parties" (p. 53); that arbitrators have "no general authority to invoke public laws that conflict with the bargain bet-

ween the parties" (p. 53); and that arbitration, with its procedural informality, is a "comparatively inappropriate" forum in which to finally resolve individual Title VII claims (p. 56). In so concluding, the Court noted that the union has exclusive control of the manner in which a grievance is processed and that a "harmony of interest between the union and the individual cannot always be presumed, especially where a claim of racial discrimination is made" (p. 58, fn. 19).

The Court rejected the lower court's belief that granting an employee access to two forums would "sound the death knell for arbitration clauses in labor contracts" (p. 54), noting that the concomitant no-strike pledge would outweigh "whatever costs may result from according employees an arbitral remedy against discrimination in addition to their judicial remedy under Title VII" (p. 55). Indeed, both the employer and the employee might have incentive to pursue the "therapeutic" process of arbitration which could produce a satisfactory result and obviate the need for litigation. The Court concluded at pages 59-60:

> We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.

ii. Approval of the right to vindicate FLSA claims in a federal court

A strikingly similar analysis was pursued in *Barrentine* v. *Arkansas-Best Freight Systems*, 450 U.S. 728 (1981), which involved a conflict between principles embodied in the LMRA and the Fair Labor Standards Act (29 U.S.C. § 201, *et seq.*). In *Barrentine*, the issue was whether time spent in pre-trip safety inspection as well as time spent driving a defective vehicle to the company's repair facility was compensable. Pursuant to the grievance clause of the contract, the

employees' union submitted the claim to the joint grievance committee for final and binding arbitration. The employees' claim was rejected. The employees then filed an action in federal district court. Count I alleged that pre-trip safety inspection and transportation time was compensable under the FLSA. Count II alleged that the union had breached its duty of fair representation by entering into a "side deal" with the employer with regard to compensation for non-trip time. The district court noted that the collective bargaining agreement, if read literally, *would* require compensation for the time claimed. Admitting the probable existence of a side agreement, the court found no breach of the duty of fair representation. The court also refused to address the merits of the employees' FLSA claim. The Court of Appeals for the Eighth Circuit affirmed, adding that since national labor policy encourages the arbitration of labor disputes, wage disputes arising under the FLSA could also be the subject of binding arbitration if the collective bargaining agreement so provided. This Court reversed, holding that an arbitrator's ruling would not bar an employee from seeking judicial review of his *statutory* claim on the merits whether or not it had been previously submitted to an arbitrator.

The FLSA is analogous to ERISA in that both are remedial statutes designed to protect *individual* employees' rights with respect to the basic terms and conditions of employment, including entitlement to wages and fringe benefits. Thus, this Court's analysis of the tension between the LMRA and the FLSA is applicable to the tension that exists between the LMRA and ERISA in the case at bar, notwithstanding it is the Trustees who are claiming *statutory* rights on behalf of participants.

The Court first noted that the LMRA protects *collective* interests while the FLSA protects individual rights: "A tension arises between these policies when the parties to a collective-bargaining agreement make an employee's entitlement to substantive statutory rights subject to contractual dispute-resolution procedures" (p. 735). Thus, not "all disputes between an employee and his employer are suited for binding resolution in accordance with procedures established by collective bargaining," certainly not those concerning

"rights arising out of a statute designed to provide minimum substantive guarantees to individual workers" (p. 737) even though such rights had a parallel basis in the collective bargaining agreement. Moreover, the FLSA "grants individual employees broad access to the courts," "no exhaustion requirement or other procedural barriers are set up, and no other forum for the enforcement of statutory rights is referred to or created by the statute" (p. 740). The Court thus stated that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate."

The Court also cited a number of reasons why an employee's rights under the FLSA might be lost if submission to arbitration precluded him from later bringing suit in federal court. The Court noted that:

> . . . since a union's object is to maximize overall compensation of its members [and not] to ensure that each employee receives the best compensation deal available, a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole (p. 742).

The Court also pointed out that arbitrators are primarily competent with regard to the "law of the shop not the law of the land" and "may not be conversant with the public law considerations underlying the FLSA" (p. 743). Because the arbitrator is required to effectuate the intent of the parties rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights" (p. 744). He may also be precluded by the contract from affording the employee the full panoply of remedies provided by the statute (p. 745). Therefore, "even when the union has fairly and fully presented the employee's wage claim, the employee's statutory rights might still not be adequately protected" (p. 743). ***In other words, neither arbitration nor the duty of fair representation affords an adequate safeguard where an individual's nonwaivable statutory rights are concerned.***

I. A. 3. Mandatory deferral of Trustee audit and collection actions is inappropriate based on the principles set forth above

In the case at bar, mandatory deferral of audit and collection actions to grievance procedures that the Trustees cannot themselves invoke is inappropriate for many reasons: most importantly, *because* of the size of the Central States Funds, the multitude and disparity of applicable grievance clauses, and the need for centralized trust administration; *because* many of the Trusts' participants and beneficiaries are no longer members of a bargaining unit and hence not subject to the *union's duty of fair representation* but only to the *Trustees' fiduciary obligations*; *because* ERISA has preempted the field of employee benefits and has not provided for arbitration in its enforcement scheme; and *because* mandatory deferral would vitiate the separateness between unions and trust funds, oust federal courts of jurisdiction, and preclude awards of statutory remedies as intended by Congress.

Respondents are Trustees of two of the largest Taft-Hartley employee benefit funds in the United States. Some 12,000 employers in at least 40 states contribute to these funds pursuant to thousands of collective bargaining agreements with local Teamster unions, many having different grievance/arbitration mechanisms for the resolution of disputes between the union and the company or between individual employees and the company. These mechanisms range from single outside arbitrators to joint management-union committees. Prior to 1982, not a *single* one of these contracts specified the grievance of disputes between employers and the Funds or their Trustees.[9] Indeed, until the Seventh Circuit ruled otherwise in *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin*, 625 F.2d 171 (7th Cir. 1980), it was assumed that *Congress* did not contemplate or require benefit fund *trustees* to exhaust the intracontractual mechanisms of an *individual employer's* collective bargaining agreement, but could pursue their claims in federal court

[9] In 1982, the National Master Freight Agreement, to which Howard Martin (not Prosser or Schneider) was a signatory, was amended to expressly provide the Trustees with direct access to its grievance procedures.

either under Section 301(a) of the LMRA and/or Section 502 of ERISA. Hence, the issue of *mandatory deferral* is one of recent vintage. (*See* Trustees' Consolidated Brief in Opposition to Writs of Certiorari and the cases cited therein, p. 6). Because of the *disparity* of operative grievance/arbitration clauses as well as the Trustees' lack of *direct access* to them, *mandatory deferral* is inimical to uniform trust administration.

Respondents serve the interests of some 500,000 participants and beneficiaries. Some of them are active workers and union members. Union membership, however, is not a prerequisite for contributions and ERISA benefits. Particularly in "right to work" states, many participants are not union members. Nevertheless, they are engaged in covered employment under operative collective bargaining agreements and are entitled to contributions from their employers and fair representation by their unions. Yet a third group of participants and beneficiaries are *retirees* and their families. As the Court of Appeals for the Eighth Circuit noted, this group stands outside of the bargaining unit, has no voice in union affairs, and is not subject to the union's affirmative duty of fair representation (A-14, 17). This group must *rely entirely* on the vigilant and vigorous activity of the Fund Trustees for the protection of their retirement income and health benefits. *See also Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960), and *Allied Chemical and Alkali Workers of America, Local 1* v. *Pittsburgh Plate Glass*, 404 U.S. 157 (1971).

Mandatory deferral and forced reliance on unions to invoke the contract's grievance procedures, as required by the Seventh Circuit in *Howard Martin* and advocated by Petitioners here, would not necessarily serve the interests of non-union members and retirees and their dependents, as the Eighth Circuit observed. As this Court noted in *Alexander* v. *Gardner-Denver* and *Barrentine* v. *Arkansas-Best Freight Systems, supra*, a harmony of interest between unions and individual employees cannot always be presumed. This is particularly true in the case of retirees and non-members, not to mention the Trustees as to whom the law affirmatively *precludes* a duty of fair representation.

Because the Central States Funds, like all multiemployer employee benefit plans, pool the contributions received from all employers and determine their funding and benefit policies in accordance with actuarial assumptions taking into account the entire contribution base, any claim or action against an individual employer affects the fiscal integrity and actuarial solvency of the entire Fund. While a dispute may appear "local" as to that particular employer, and hence amenable to its particular grievance procedure, it is "national in character" from the perspective of the Funds as a whole and the participants and beneficiaries they serve. In contrast to the local mine safety dispute found arbitrable in *Gateway Coal*, ERISA has preempted the field of employee benefits and *mandatory deferral* has no place in its enforcement scheme notwithstanding an employer raises a "coverage" dispute as a defense to a collection action. This is particularly true since the Trustees' refusal to arbitrate the dispute would neither promote nor disrupt labor peace. (As will be discussed below, audits are internal Fund activities, subject to the exclusive and discretionary judgment of the Trustees. *Mandatory deferral* of this dispute is particularly inappropriate.)

While the Central States Funds (like most multiemployer employee benefit trusts) were established and structured in accordance with Section 302(c)(5) of the LMRA, they are administered by Trustees whose rights and obligations are subject almost exclusively to the prescriptions of ERISA: their powers and duties *must* be set forth in a written trust agreement (29 U.S.C. § 1102); they *must* comply with *statutory fiduciary* standards (29 U.S.C. §§ 1001, 1104); they *must* refrain from engaging in specified *prohibited transactions* (29 U.S.C. § 1106), the breach of which exposes them to personal liability (29 U.S.C. § 1109); they may *not delegate* basic trustee responsibilities unless specifically authorized by the statute (29 U.S.C. § 1105); they *must* see to it that benefit plans comply with ERISA's rules on funding, vesting, participation, recordkeeping, and disclosure (29 U.S.C. §§ 1022-1059) (*See* App. B).

The fact that many of the Trustees' ERISA rights and obligations have been memorialized in Trust Agreements

which in turn have been incorporated by reference into collective bargaining agreements between employers and unions does not transform these statutory powers and responsibilities into contractual terms subject to *mandatory deferral* if a dispute arises with regard to matters of trust administration (of which collections and audits form a basic part. *See* DOL and IRS Reg. 76-1, March 26, 1976, 41 F.R. 12740).[10] Indeed, it is well-established that trust law rather than labor law principles inform the statutory scheme; that the funds and unions are and must be entirely separate entities; and that fund trustees stand completely outside of the collective bargaining process. *Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981); *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982); *see also Sinai Hospital* v. *National Benefit Fund for Hospital & Health Care Employees*, 697 F.2d 562 (4th Cir. 1982). Compulsory arbitration has never formed part of the law of trusts.

Arbitration is not provided for either in the Trust Agreements governing the Central States Funds or in ERISA. Rather, direct access to a judicial forum was specified both by the drafters of the trust's governing documents (Article III, Section 4, J.A. p. 22) as well as by Congress in 1974 (29 U.S.C. §§ 1001(b), 1132(e)). In 1980, Congress amended ERISA and created a *new* and *distinct* cause of action for the collection of delinquent contributions, affording plans far more liberal (and mandatory) *statutory* remedies if their *litigation* efforts proved successful (29 U.S.C. §§ 1145, 1132(g)(2)) (App. B). Among these remedies are costs, liquidated damages, and reasonable attorney's fees which would not, of course, be available to unions if they chose to engage in collection actions through *arbitration* on behalf of the funds.

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[10] This regulation created a class exemption permitting fund trustees to compromise or settle delinquency claims in accordance with the "prudent man" rule of ERISA. However, the regulation presupposes vigorous, orderly and systematic procedures for collecting delinquent contributions in the normal situation, indicating that failure to implement them would be a prohibited transaction. Comments prefacing the Regulation note with approval the field audit programs of multiemployer funds.

As was the case in *Boys Markets, supra*, a hallowed institution—here, the grievance/arbitration of controversies arising out of collective bargaining agreements in accordance with 203(d) of the LMRA—will require *reexamination and accommodation in light of the goals of subsequently enacted pension law*, ERISA and MPPAA, particularly in view of the fact that *mandatory deferral* could have the practical effect of *ousting federal courts of jurisdiction* over trustee collection actions even though there is no countervailing necessity to preserve industrial peace. Contrary to the assertion of the Seventh Circuit in *Howard Martin*, "simple" collection actions rarely exist, and any *claimed* contractual dispute would enable an employer to have the trustees' action dismissed.[11] As in *Barrentine* v. *Arkansas-Best Freight Systems* and *Alexander* v. *Gardner-Denver*, the Court will be asked to consider whether an arbitrator can provide benefit plans with the remedies intended by Congress and whether unions can be safely relied upon to overcome the inherent conflicts of interest suggested by the Eighth, Fifth, and Third Circuits; or whether mandatory deferral of trustee actions to procedures that can be invoked only by the union will vitiate the separateness between trust funds and unions and the principles of nondelegability mandated by Congress.

In sum, with all due respect to the authors of the dissenting opinion in the Eighth Circuit, the mere fact that Petitioners have alleged that resolution of the Trustees' audit and collection actions requires interpretation of the collective bargaining agreement does not *ipso facto* convert these actions from basic matters of trust administration into traditional collective bargaining disputes subject to arbitration, no less to *compulsory* arbitration through procedures the Trustees cannot themselves invoke. As the four decisions set forth above suggest, each of whose rationale has an important application to the case at bar, a thorough process of balancing and accommodation is required to resolve the role of arbitration in the context

[11] *See United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 568 (1960), in which the majority held that courts had no authority to weigh the merits of a dispute which, on its face, was covered by the grievance clause of the collective bargaining agreement.

of ERISA controversies. It is simply not sufficient to assert, as Petitioners have done, that a federal presumption exists in favor of arbitration. The law did not stop short twenty-four years ago with the *Steelworkers Trilogy* and interpretation of collective bargaining agreements by federal judges[12] does *not* presuppose that courts will renegotiate or rewrite these agreements in derogation of an employer's intended obligations.

I.B. Fund trustees are not parties to collective bargaining agreements and are therefore not required to submit their disputes with contributing employers to the grievance/arbitration mechanisms set forth therein

Federal policy in favor of arbitration derives in the first instance from a *specific Congressional enactment*: Section 203(d) of the LMRA provides: "Final adjustment by a *method agreed upon by the parties* is hereby declared to be the *desirable* method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement" (29 U.S.C. § 173(d) emphasis supplied). While 203(d) has been construed to mean that Congress specifically endorsed the inclusion of grievance/arbitration procedures in collective bargaining agreements,[13] the statute itself merely emphasizes that the parties to such contracts should come to *private agreements* as to how best to resolve their disputes and that outside intervention should be as limited as possible. It is clear that Section 203(d) of the LMRA regards arbitration as a *purely consensual* matter.

Federal preference for arbitration as a matter of national labor policy was given both practical meaning and presumptive force thirteen years later in the celebrated *Steelworkers Trilogy: United Steelworkers of America* v. *American Man-*

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[12] Considering the fact that multiemployer plans have been expressly conceived as *trusts* and that the relief contemplated by ERISA is essentially equitable in nature, collection actions are *rarely* heard by juries unless an ancillary legal issue is involved such as the validity of a promissory note. The normal collection action is basically an action for the specific performance of a contractual obligation. (*See*, App.. B, 29 U.S.C. 1103)

[13] *See United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 566 (1960).

ufacturing Co., 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

As opposed to arbitration in the commercial context which provided an alternative to litigation over specific matters where the working relationship between the contracting parties had already broken down and a decision in favor of one of them was required, labor arbitration was conceived as a *dynamic, ongoing* part of the *collective bargaining process itself* (pp. 580-581). Grievance/arbitration was designed to give "meaning and content" to labor agreements which, unlike the ordinary commercial contract, were *not* limited to specific matters but covered the entire employment relationship and could not possibly comprehend the "myriad" of problems likely to arise in an industrial setting (pp. 578-580). Because such unforeseen problems required both flexible and expeditious resolution, great emphasis was placed on the special expertise of the labor arbitrator who was expected to develop, become familiar with, and apply "the common law of the industrial shop" in accordance with the "variant needs and desires of the parties" (pp. 581-582).

The Court left no doubt, however, that the *primary* goal of grievance/arbitration was the promotion of industrial peace. Hence, the Court concluded that unless a particular dispute was *expressly excluded* from the grievance clause of a collective bargaining agreement, it should be *presumed* arbitrable (pp. 581, 583-585). In contrast to prior decisions, in which the Court refused to find an *implied intent* to submit a dispute to arbitration but required the parties to manifest such an intent in *clear and plain language* (pp. 585-587, 589, dissenting opinion of Justice Whittaker), the Court now decided that in labor disputes the judicial inquiry should be limited to searching only for an explicit provision that would bring the particular controversy under the *exclusion* clause (if any), all other doubts *being resolved in favor of coverage* (p. 583). Moreover, courts would have no authority to weigh the grievance on its merits and decline to compel arbitration even if the claim was "*frivolous*". The Court thought that the processing "of even

frivolous claims" might have "a therapeutic value" which might not be appreciated by those (such as judges) who were not part of "the plant environment" (p. 568). Finally, if the arbitration award drew its essence from the collective bargaining agreement, courts were required to honor it regardless of whether or not they would have come to a similar conclusion; in other words, judicial review of arbitration awards was intended to be *extremely* limited (pp. 597-599).

The Court's departure from traditional contract law, its creation of a presumption in favor of arbitration, and its espousal of limited judicial review were justified by the very *practical* fact that grievance/arbitration clauses were normally accompanied by a no-strike provision. Since the union's express or implied pledge to refrain from work stoppages as well as the employer's agreement to submit disputes to grievance/arbitration were specifically enforceable under Section 301(a) of the LMRA, both in federal and state courts, the ultimate result of giving the most liberal effect to grievance/arbitration clauses could indeed be the widespread elimination of work stoppages and other forms of economic warfare impeding the free flow of commerce. Limited judicial review was, of course, necessary not so much to *liberate courts* from the task of interpreting labor contracts as to *provide incentive to the bargaining parties to negotiate* grievance/arbitration clauses. Obviously, if courts could overturn arbitrators' awards and review contractual disputes *de novo* a bargain for the arbitrator's judgment would be illusory and unions would have little reason to withhold the use of their economic weapons which are often the only efficacious ones!

The *presupposition* for the presumption in favor of arbitration and the limited role of courts in the resolution of labor conflicts covered by grievance/arbitration clauses is that *parties to a collective bargaining agreement* have *expressly agreed* to submit at least some of their contractual disputes to this forum. As Justice Brennan noted in his concurring opinion in *American Manufacturing*, arbitration is fundamentally a "creature of contract" (p. 570). Indeed, the contractual basis of arbitration is one of the main threads that links the three cases of the *Trilogy* together. Thus, while the presumption

itself was first articulated in *Warrior and Gulf*, the Court even there cautioned that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (p. 582). Hence, "judicial inquiry under Section 301 must be strictly confined to the question of whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator the power to make the award he made" (*id.*). Arbitrators, after all, are specifically *selected by the parties* because of *their* "confidence in his knowledge of the common law of the shop and *their trust* in his *personal judgment* to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . For the *parties'* objective in using the arbitration process is *primarily to further their common* goal of uninterrupted production under the agreement, *to make the agreement serve their specialized needs*" (*id.*, emphasis supplied). It is this very reasoning that prompted the Court to require a strict hands-off attitude in reviewing the merits of arbitration awards. As noted in *Enterprise Wheel and Car Corp.*, to the extent a party has *agreed* to submit disputes to arbitration, "it is the arbitrator's construction which was bargained for" (p. 599).

In *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962), the Court applied *Steelworkers* principles in a 301 action brought by a company for an injunction and damages in connection with the breach of a no-strike clause. The act that precipitated the allegedly unlawful strike was the company's docking of three employees a total of $2.19, which pay claims were concededly subject to the grievance clause of the collective bargaining agreement. In an analysis strikingly pertinent to the case at bar, Justice White determined, by scanning the entire contract, that the *company's damages* claim, unlike the *employees' pay claims*, was *not* subject to the grievance/arbitration clause. In fact, the Court found that the grievance/arbitration clause standing by itself was dispositive because it expressly precluded arbitration boards from considering *any* matters *other than employee grievances*. The contract did not merely set forth specific procedures to be followed by employees or workmen's committees, it expressly provided that:

> . . . local arbitration boards "shall consider only individual or local employee or local committee grievances arising under the application of the currently existing agreement." *There is not a word in the grievance and arbitration article providing for the submission of grievances by the company*. Instead, there is the express, flat limitation that arbitration boards should consider only employee grievances. Furthermore, the article expressly provides that arbitration *may be invoked only at the option of the union. At no place in the contract does the union agree to arbitrate at the behest of the company. The company is to take its claims elsewhere, which it has now done*. (p. 243, emphasis supplied)

The lower courts' denial of the union's motion to dismiss the damages claim for exhaustion was affirmed.

The imposition of a contract provision on a nonconsenting party is a derogation of basic contract principles, including the freedom *not* to contract. It is nevertheless true that the arbitration clause of a collective bargaining agreement has been imposed on nonsignatories in two specific situations, the first involving successor corporations (*see John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964)) and the second involving individual employees in a bargaining unit (*see Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965); *Vaca* v. *Sipes*, 386 U.S. 171 (1967)). The factual and policy considerations that underlie cases such as these differ substantially from those at issue here.

In the case of a successor corporation, the predecessor has often ceased to exist so that the grievant would have no remedy if arbitration were not imposed. As the Court noted in *Wiley*, employees have little if any voice in corporate mergers or other forms of structural transformation and thus require some protection against sudden changes in the terms and conditions of their employment. Even here, however, the Court did not suggest that arbitration of every kind of grievance would be unconditionally required. (Similar principles

require the arbitration of some disputes after a union has been decertified and/or the contract has expired.)[14]

Employees in an existing bargaining unit, in contrast, have voluntarily relinquished a substantial number of individual (non-statutory) rights by selecting a union as their exclusive bargaining representative and by ratifying the resulting collectively negotiated agreement. While such employees are not formally "parties" to the contract (since they are not signatories thereto) they are certainly quasi-parties in substance. As to them, the grievance/arbitration mechanism is no different from the other negotiated terms and conditions of employment and must be exhausted where a covered dispute arises. Any other approach would undermine the statutory doctrine of exclusive representation and the whole process of *collective* bargaining.[15] Practical considerations also dictate that individual employees should not routinely bypass intracontractual procedures; in terms of sheer numbers, a liberal approach to contract circumvention would impose impossible burdens on courts. In any event, these two exceptions do not weaken the *absolute* nature of the party requirement enunciated in the *Steelworkers Trilogy*.

Applying the above principles to the present appeal, it is clear that the Eighth Circuit was correct in holding that Respondents were not contractually required to submit their disputes with Petitioners to the grievance mechanisms of the collective bargaining agreement as a condition precedent to filing suit in federal court.

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[14] *See*, for example, *Nolde Bros., Inc.* v. *Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243 (1977); *United States Gypsum Co.* v. *United Steelworkers of America*, 384 F.2d 38 (5th Cir. 1967, *cert. denied*, 389 U.S. 1042.

[15] Petitioners focus heavily on the union's exclusive duty to represent employees. This doctrine, embodied in Section 9(a) of the LMRA (29 U.S.C. § 159(a)) has nothing to do with the issue at bar. The Trustees are not "bargaining" on behalf of employees by seeking a federal court's *interpretation* of disputed terms of a *negotiated* collective bargaining agreement. Schneider's argument that the Eighth Circuit's opinion will "undermine" the union's status as "the statutory exclusive bargaining representative of an employer's employees" (p. 15) has no merit.

First, there is no provision in ERISA similar to Section 203(d) of the LMRA encouraging *trustees* to enter into *private agreements* to resolve disputes with contributing employers outside the context of a federal court with its procedural safeguards. (ERISA requires only *benefit claimants* to exhaust a *plan's* review and appeals procedure before filing suit under Section 502.)[16]

Second, trustees are third-party beneficiaries of collective bargaining agreements, not parties to them. Respondents *did not agree* to substitute the judgment of an arbitrator for that of a federal court. Moreover, the Trust Agreements governing the Funds *expressly authorize judicial proceedings* (Article III, Section 4, J.A. 22). Although Article III, Section 1 clearly states that an employer's contribution obligations depend on the terms of a collective bargaining agreement, the Trust Agreements nowhere provide for the deferral of Trustee collection claims to the arbitration mechanisms of that agreement if a dispute over particular terms arises with an employer. Indeed, Article III, Section 4 expressly states that the Trustees and the union are to act separately and independently in enforcing contribution obligations without prejudice to the legal rights of either. The Trustees *have* no arbitration rights under the labor agreements (J.A. 55-57, 76-79).

Disputes concerning the interpretation of the Trust Agreements themselves must be submitted to the Trustees who alone have the authority to make final and binding resolutions (Article IV, Section 17, J.A. 26-27). Such interpretations must be enforced by courts unless the person challenging the Trustees' construction can prove that it was arbitrary and capricious. See *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977). The Trustees' contractual right to conduct audits is controlled by Article III, Section 5 of the Trust Agreements.

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[16] Prosser's argument (p. 42) that the right of the Trustees to sue on behalf of participants and beneficiaries is no greater than the rights of these persons to sue on their own behalf has no merit. Every collection action brought by the Trustees against a contributing employer is brought on behalf of the Funds' *entire constituency*, not solely on behalf of that employer's covered employees. This distinction will be discussed further in Section III of this Argument.

Hence Prosser's remedy was not to seek arbitration of the permissible scope of the audit but to seek a declaration from the court as to the reasonableness of the Trustees' demand for the production of records.

Third, the grievance clause of Petitioners' collective bargaining agreements from 1970 through 1982 encompassed *only* disputes "between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of this Agreement" (J.A. 55). Moreover, disputes regarding the failure to contribute to the Health and Welfare and Pension Funds was excluded from this clause as well as from the union's no-strike obligation, *infra*, p. 3, fn. 5.[17] Under the rationale in *Atkinson* v. *Sinclair Refining Co.*, *supra*, there is certainly "forceful evidence" that the parties to the collective bargaining agreement *did not intend* that disputes between Prosser, Schneider, and *the Trustees* concerning audits or collections should be deferred to the grievance mechanisms of the contract, as the court of appeals correctly found.

Finally, deferral is not required as a matter of national *labor* policy in order to promote industrial peace and to facilitate an ongoing process of collective bargaining. As this Court unequivocally decided in *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), benefit fund trustees are neutral fiduciaries who owe uncompromising loyalty *only* to fund participants and beneficiaries. *See*, Prosser Br. p. 16) They may not advance the interests and are not the representatives of the labor and management groups appointing them for the purposes of collective bargaining and the adjustment of grievances. Since they stand entirely outside of the collective bargaining *process*, they can neither precipitate nor prevent industrial strife.

Both the Fifth and the Third Circuits have endorsed the Eighth Circuit's analysis. *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983); *Trustees of the Local 478 Trucking and Allied Industries Pension Fund, and*

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[17] In this regard, all of the collective bargaining agreements from 1970-1982 are substantially the same.

the Joint Welfare Fund of Employers and Local 478, International Brotherhood of Teamsters v. *Siemens Corp.*, No. 82-5719 (3d Cir. Nov. 18, 1983), 114 L.R.R.M. 3401.

I.C. The Eighth Circuit was correct in suggesting that this Court's decision in *Lewis* v. *Benedict* encompassed procedural as well as substantive defenses to actions brought by Fund trustees against recalcitrant contributing employers

I.C.1. Collective bargaining agreements are not typical third-party beneficiary contracts and the trustees of employee benefit funds are uniquely-situated third-party beneficiaries

Petitioners, relying on commercial third-party beneficiary law and the Seventh Circuit's reasoning in *Central States* v. *Howard Martin*, 625 F. 2d 171 (7th Cir. 1980), argue that the party requirement is not dispositive since the trustees are *third-party beneficiaries* and as such can have no greater rights than those of the *parties* to the contract. Since *parties* to a collective bargaining agreement having a grievance/arbitration clause covering a particular dispute cannot proceed to court without first exhausting their intracontractual remedies, the *third-party beneficiary* trustees should be subject to the same condition precedent before litigation is permitted. In so reasoning, Petitioners (and the Seventh Circuit) have given this Court's decision in *Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960), a very *narrow* reading, a reading that is limited to the specific facts of the case and the specific substantive defense of set-off raised against the trustees, thereby *completely ignoring* the policy principles that led the Court to *depart* in a *most decisive manner* from the law of commercial contracts. The Eighth Circuit, like the Third Circuit in *Trustees of the Local 478 Pension Fund, et al.* v. *Siemens, supra*, as well as numerous district courts, chose to give this seminal case a more liberal interpretation.[18] In the interest of protecting the solvency of employee benefit funds and their beneficiaries, the approach taken by these courts

[18] *See* Respondents' Brief in Opposition to Petitions for Writs of Certiorari, p. 6, and the cases cited therein.

should be regarded as correct. As the Third Circuit noted in *Siemens, supra*: "The relevant national policy is the preservation of the independence and integrity of pension funds in order to protect the security of retired workers and their families." (114 L.R.R.M. 3404.)

In *Lewis* v. *Benedict, supra*, the trustees of the United Mine Workers Welfare and Retirement Fund sought to collect royalties from a coal operator based on the amount of coal produced in accordance with the terms of the collective bargaining agreement. The company conceded that it owed the money but claimed that its performance to the Fund was excused because the union had engaged in a work stoppage in violation of the contract's no-strike clause. The district court found for the trustees but allowed the employer a set-off in lieu of strike damages. The Court of Appeals for the Sixth Circuit affirmed. The issue as framed by this Court was: "whether the lower courts were correct in holding in effect that Benedict might assert the union's breaches as a defense to the trustee's suit, for to the extent Benedict (the promisor) does not collect from the union (the promisee), the union's liability is set off against Benedict's liability to the third-party beneficiary" (p. 464). Rejecting a mechanical application of traditional third-party beneficiary law, the court immediately responded to the issue by stating: "The answer to that question requires, we think, our consideration of the nature of the interests of the union, the company, and the trustees in the fund under the collective bargaining agreement" (p. 464). In finding for the trustees and reversing the decisions of the lower courts, Justice Brennan, speaking for the majority, noted that collective bargaining agreements were *not* typical third-party beneficiary contracts (p. 468); that the employer's interest in the third-party beneficiary fund transcended both the life of the existing contract and the mere payment of royalties (p. 468); that the employer's interest in the *solvency* of the fund should be as great as that of the union since the very existence of the fund removed from its own shoulders the burden of establishing and administering a benefit plan for its own employees which had become commonplace in modern industrial practice (pp. 468-469); that unlike the usual third-

party beneficiary contract, the collective bargaining agreement here was an industry-wide contract affecting many employers and participants (p. 469); thus, the practice of allowing set-offs because of a particular union's particular contract breach would have the ultimate effect of diminishing fund assets which would adversely affect both innocent employees whose benefits might be reduced and other contributing employers who might be forced to contribute higher royalties to make up for deficiencies caused by set-offs (p. 469).

The court also noted that allowing such a defense would unfairly affect the interests of *fund participants and beneficiaries who might already be retired or who might be dependents and hence without any direct voice in union affairs* (p. 470). Moreover, the court noted that the employer's *contractual obligation* to pay royalties was an *independent promise* based solely on the amount of coal produced and was not in any way *contingent* upon the union's performance of any of its promises in the contract (pp. 465-466). In fact, the court treated the employer's promise to pay *benefits* as analogous to its independent promises to pay *wages* to each individual in its employ covered by the collective bargaining agreement, which wages would assuredly not be subject to a set-off on account of unlawful union conduct (pp. 469-470). For all of the above reasons, but particularly in its desire to protect the solvency of employee benefit funds and hence the welfare of their beneficiaries, the Court held that "the parties to a collective bargaining agreement must express their meaning in unequivocal words before they can be said to have agreed that the union's breaches of its promises should give rise to a defense against the duty assumed by an employer to contribute to a welfare fund meeting the requirements of 302(c)(5)" (p. 470).

The Court, which decided *Lewis* v. *Benedict* in February, 1960, drew many of its policy considerations from Section 302(c)(5) of the LMRA which, like ERISA and MPPAA after it, was designed to afford certain protections to benefit fund participants and beneficiaries. The decision was expressly

endorsed by Congress twenty years later. In a speech to the House of Representatives on August 25, 1980, just prior to passage of MPPAA, Rep. F. Thompson, one of the bill's major sponsors, asserted on behalf of himself and others who drafted the legislation:

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case. *Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law–other than 29 U.S.C. 186.* Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.
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> In this regard we endorse judicial decisions such as *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); and *Huge* v. *Long Hauling Company, Inc.*, 590 F.2d 457 (3rd Cir. 1978). *Cases such as Western Washington Laborers/Employers Health and Security Trust Fund* v. *McDowell*, —— F. Supp. ——, 103 L.R.R.M. 2219 (W.D. Wash. 1979) and *Washington Area Carpenters Welfare Fund, et al.* v. *Overhead Door Company*, C.A. No. 79-0097, USDC D.C. April 22, 1980, are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect *by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.* 126 Cong. Rec. (House) 23039 (August 25, 1980).

The only defenses Rep. Thompson would have permitted appear to be those based on the absence of a predicate agreement between an employer and a labor organization, the non-exclusive deployment of fund assets for employees and their dependents, or structural defects in the trust, e.g., viola-

tions of the requirements of Section 302 of the LMRA which must be met if contributions are to be deemed lawful and if the trust is to preserve its tax exempt status. (Interestingly enough, the Court of Appeals for the District of Columbia recently held that absent proof of union domination even the structural defect of unequal representation of labor and management trustees would not excuse an employer's contractual obligation to contribute to the benefit fund in question. *See National Stabilization Agreement* v. *Commercial Roofing & Sheet Metal*, 655 F.2d 1218 (D.C. Cir. 1981).

Clearly, Congress intended to *substantially narrow* the range of defenses available to an employer in collection actions brought by fund trustees in the interests of promoting the fiscal health of these trusts and the expectations of their beneficiaries. Thus, the policy considerations that led this Court to state in 1960 that collective bargaining agreements are not typical third-party beneficiary contracts and that trustees are not typical third-party beneficiaries have gained *added* strength and support from the passage of ERISA in 1974 and MPPAA in 1980. Indeed, this Court has continued to respond with great sensitivity to the needs both of fund beneficiaries and of funds themselves in three recent landmark decisions: *Nachman Corp.* v. *PBGC*, 446 U.S. 359 (1980), in which the Court found that certain provisions of ERISA could supersede exculpatory clauses in employers' trust agreements limiting their funding obligation and the payments of promised benefits to the assets of the plan at the time of termination; *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), in which the Court held that it was not an unfair labor practice for a union to strike an employer in support of its demand for participation in an already existing national pension and welfare fund which offered greater portability and benefits to covered employees than would the single-employer plan proposed by *Amax* as an alternative during collective bargaining negotiations; *Jim McNeff* v. *Todd*, 103 S. Ct. 1753 (1983), in which the Court held that an employer's obligation to contribute to certain fringe benefit funds was enforceable under prehire contracts permitted in the construction industry without proof of the union's majority status and until such time as the contract was *overtly* repudiated.

Fully aware of Congress's desire to improve the financial health of multiemployer funds by creating both a new cause of action for delinquent contributions and by imposing harsh sanctions against employers who breached their contractual obligations (Sections 306(a) and (b) of MPPAA, 29 U.S.C. §§ 1145, 1132(g)(2)), this Court had an opportunity to reexamine the third-party status of fund trustees in *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), and to overrule *Lewis* v. *Benedict* upon reconsideration of the issues involved. It did not do so.

In *Kaiser Steel*, the issue was whether the trustees of the United Mine Workers Health and Retirement Funds could enforce Kaiser's purported contractual obligation to contribute royalties based on coal it *purchased for use or sale* from *non-signatory coal producers* whose employees were not represented by the United Mine Workers and who had not made contributions to the UMW Funds in connection with the coal it sold to Kaiser. When the trustees filed suit to collect royalties on the purchased coal, Kaiser raised the defense that the "purchase of coal" clause in the collective bargaining agreement violated basic antitrust provisions of the Sherman Act (15 U.S.C. §§ 1, 2) and the hot cargo provision of the LMRA (29 U.S.C. § 158(e)). Hence, its promise to pay royalties based on purchased coal was void and unenforceable.

Respondents argued, in essence, that under *Lewis* v. *Benedict*, fund trustees, as innocent third-party beneficiaries, were not subject to the illegality defenses to a contract they did not negotiate just as they were not subject to a set-off for damages resulting from an illegal strike they did not cause and could not prevent. Although the Court recognized that payments to employee benefit funds are generally legal, and did not repudiate the proposition that pension and welfare provisions of collective bargaining agreements may to some extent be regarded as independent of the rest of the contract, it also noted that trustees have no *special status* which exempts them from the general rule that courts do not enforce *illegal contracts*. The "purchase of coal" clause at issue here was the *very measure* of Kaiser's contractual obligations to the funds and was *itself illegal*. Rejecting Respondents' reliance on *Lewis* v. *Benedict* and the legislative history in support of

MPPAA, the Court merely noted that *Lewis* was not intended to give trustees the right to enforce *illegal promises*; that MPPAA was not intended to *implicitly* repeal *existing federal law*; and that if Congress wished to permit trustees to collect monies based on promises otherwise violative of federal law the legislature itself should have created a specific exemption.

Neither the LMRA nor ERISA provides for the *mandatory arbitration* of disputes arising under collective bargaining agreements. *Kaiser Steel* did not overrule *Lewis* v. *Benedict* and did not erode this Court's *pre-ERISA* pronouncement that employee benefit fund trustees *are* uniquely situated third-party beneficiaries and are *generally not* subject to defenses that can be raised by promisor employers against promisee unions. Indeed, the *very limited* scope of the holding in *Kaiser Steel* compared with the breadth of the issue as framed and resolved by the Court in *Lewis* v. *Benedict* supports the proposition, held by a majority of courts including the Eighth Circuit, that *Lewis* v. *Benedict* can and should be read to encompass the procedural defense of exhaustion.

When Prosser and Schneider executed collective bargaining agreements and agreed to be bound by the terms and conditions of the Trust Agreements governing the Funds, the Trustees had the right to rely on unobstructed access to a federal tribunal. Absent unequivocal words in the agreements to the contrary, there is no merit to the argument that mandatory deferral of these audit and collection disputes is required by law. Indeed, the Third Circuit has indicated that parties to collective bargaining agreements cannot subject trustees of employee benefit funds to an arbitral forum without their "explicit" consent. *Siemens*, 114 L.R.R.M. 3403-4.

I.C.2. Congress intended that the federal statutory rights of these uniquely-situated third-party beneficiaries be advanced and protected by federal court procedures; Trustees do not seek greater substantive rights than those negotiated by the parties to the collective bargaining agreement

i. The Trustees of employee benefit funds are entitled by statute to the procedural safeguards and other advantages of federal court review

Trustees of multiemployer funds have a *statutory* right to file actions in federal court to collect contributions owed (29 U.S.C. §§ 1001(b), 1132, 1145). Indeed, they have a statutory *obligation* to do so since contributions owed but not collected are fund assets which, if left in an employer's hands, constitute an extension of credit to a party-in-interest which is a prohibited transaction under ERISA (29 U.S.C. § 1106(a)(1)(B)). Moreover, the Funds would be *unsecured* creditors with a limited priority in the event of a delinquent employer's bankruptcy.

Obviously, trustees cannot collect what they do not know is owed. Hence, the right to conduct audits is not only circumscribed within the right to collect, but is also implicit in ERISA's "prudent man" rule (29 U.S.C. § 1104, App. B). In exercising the twin fiduciary obligations of auditing employer records to verify the accuracy of reporting and collecting delinquent contributions, the Trustees are in turn protecting the interests of hundreds of thousands of participants and beneficiaries who themselves not only have statutory rights to benefits but also the right to *rely on the Trustees* to protect the financial solvency of the Funds.

Petitioners, relying on the Seventh Circuit's decision in *Central States* v. *Howard Martin*, 625 F. 2d 171 (7th Cir. 1980), contend that the right to present a case before a federal court rather than to an arbitrator is a *greater* right than that which the employer and the union can enjoy under the collective bargaining agreement, and hence should not be available to the *third-party beneficiary trustees*. The Seventh Circuit in turn relied on a pre-ERISA case, *IBEW, Local 308* v. *Dave's Electric Service*, 382 F. Supp. 427 (M.D. Fla. 1974), in which the district court stated at p. 433:

> Requiring arbitration, of course, *will not subvert any rights*. It will *merely change the initial forum in which those rights are determined to the preferred forum as a matter of national labor policy and the selected forum by the terms of the agreement itself.* (emphasis supplied)

The position taken by the district courts in *Dave's Electric and in Howard Martin*, (No. IP 78-226-C, S.D. Ind. 1979), and

by the Seventh Circuit is clearly erroneous. As the Supreme Court stated in *Alexander* v. *Gardner-Denver*, 415 U.S. 36, 56: "We have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated' " (quoting from *U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351, 359-390 (1971).

As far back as 1965, Justice Black in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965) wrote a very strong dissenting opinion in which he contrasted arbitration and judicial proceedings in the context of an employee's attempted contract action for severance pay:

> Arbitration differs from judicial proceedings in many ways.(...); arbitrators need not be instructed in the law; they are not bound by the rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited.

379 U.S. at 664. In other words, Justice Black believed that it "can make a crucial difference" whether claims are settled by arbitration or by a court.

Nine years later, Justice Black's distinctions were espoused by this Court in *Alexander* v. *Gardner-Denver*, 415 U.S. 36 (1974), cited by the Eighth Circuit. In asserting that "arbitration is a comparatively inappropriate forum for the final resolution of rights created by Title VII (p. 56)," Justice Powell, speaking for a *unanimous* Court, noted that:

> . . . the fact-finding process in arbitration is usually not equivalent to judicial fact finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable. *See Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203 (1956); *Wilko* v. *Swan*, 346 U.S. at 435-437. And as this Court has recognized, "arbitrators have no obligation to the court to give their reasons for an award." *United Steelworkers of America* v. *Enter-*

> *prise Wheel and Car Corp.*, 363 U.S. at 598. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.

415 U.S. at 57-58. The Court went on to suggest that if Title VII rights were to be adequately *insured* in an arbitral forum, arbitration would tend to become a procedurally complex, expensive, and time-consuming process (p. 59). Thus, the very reasons why parties to collective bargaining agreements opt for arbitration instead of litigation would no longer exist. In enacting ERISA, Congress contemplated that fund trustees would have access to the procedural formalities of the federal courts.

It should also be noted that collection actions rarely involve only "coverage" disputes such as the ones that occurred in the Schneider litigation and in *Howard Martin, supra*. Often questions of coverage under a collective bargaining agreement are accompanied by disputes, for example, over accounting problems, the appropriate statute of limitations, or the duty to contribute after contract expiration. Answers to Fund complaints generally contain a list of defenses besides exhaustion, typically, laches, waiver, estoppel, accord and satisfaction, and failure to state a claim. Resolution of the merits of these defenses in 301(a) or 502 actions requires the application of federal labor and pension law to the facts. *See Audit Services, Inc.* v. *Rolfson*, 641 F.2d 757 (9th Cir. 1981). In *Alexander* v. *Gardner-Denver, supra*, the Court expressly stated that "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land" (p. 57). Mandatory deferral would require the Trustees either to split a collection action immediately or to await the outcome of arbitration with all the attendant risks of delay.

A further reason why mandatory deferral would prejudice the Funds concerns the issue of remedies. In *Barrentine* v. *Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981), this Court noted that arbitral procedures are not merely less protective of statutory rights than are judicial procedures, but that arbitrators are often powerless to apply remedies that are provided for in the operative statute. Indeed, Justice Brennan,

speaking for a majority of seven, stated that it would be "most unlikely" that an arbitrator would have the contractual authority to award an aggrieved employee the liquidated damages, costs, and attorney fees provided by the FLSA (p. 745). Similarly, in cases like the ones at bar, an arbitrator would be "most unlikely" to award fund trustees the double interest, liquidated damages, costs and reasonable attorney fees which are *now mandatory* under ERISA (29 U.S.C. § 1132(g)(2)) where trustees prevail *in court* in an action to collect delinquent contributions. It would not take much ingenuity on the part of an employer sued by a fund to allege a "contract interpretation" dispute, demand exhaustion, and thereby avoid the remedies Congress was at pains to provide in enacting MPPAA. In such a situation, there cannot be a "therapeutic" value in mandating the deferral of *frivolous* claims as suggested in *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 568. It must be emphasized that under *Steelworkers'* principles courts have *no authority* to examine the merits of a grievance (hence, a disputed interpretation of a patently clear contract term). The *Howard Martin* court did not appear to realize this when it drew a distinction between "simple collection actions" (nondeferrable) and actions involving *bona fide* disputes over contract terms (deferrable). And, as the Fifth Circuit observed in *Bugher* v. *Consolidated X-Ray Service Corp., supra:* "If a delinquency were truly undisputed . . . one assumes that legal action would not be necessary at all" (p. 1434).

Yet another problem with mandatory deferral derives from the *Steelworkers Trilogy* and was illustrated in the recent case of *W.R. Grace & Co.* v. *Local Union 759*, 103 S. Ct. 2177 (1983): lack of *stare decisis* or *res judicata* principles in arbitration and hence a lack of finality. As long as an arbitration award derives its "essence" from the collective bargaining agreement, it cannot be overturned *by a reviewing court.* This rule does not, however, require an *arbitrator* to *defer to the decision of a prior arbitrator* if he believes the former's reasoning to have been unsound, as occurred in *Grace.*

In a recent Second Circuit opinion, the problem of lack of finality of arbitration awards was even more strikingly illus-

trated. *Connecticut Light and Power Co.* v. *Local 420, IBEW*, 718 F.2d 14 (2d Cir. 1983). The issue faced by the Second Circuit was how to resolve or reconcile *conflicting arbitration awards* each of *which drew their "essence" from the collective bargaining agreement but nevertheless resulted in differing conclusions and purported to bind the future conduct of the company and the union*[19]. The court set forth guidelines to be followed in the case of conflicting arbitration awards involving identical issues and identical parties: first, each award must be viewed separately to see if it draws its essence from the collective bargaining agreement; if one does and the other does not, the award that does clearly controls; if both draw their essence from the contract and hence meet the tests established in the *Steelworkers Trilogy*, the court must enforce that *arbitration award whose rationale* best reflects the intent of the parties (which brings the court perilously close to interpreting the contract *de novo* although the court insisted that an *independent review* was not permitted unless *neither* award drew its essence from the collective bargaining agreement).

Significantly, the court of appeals noted that conflicting arbitration awards are not anomalous but consistent with the actual practice of arbitrators; moreover, that collective bargaining agreements themselves *contemplate* that different ar-

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[19] In *Grace*, the issue was whether a conciliation agreement entered into by a company and the EEOC, which effectively changed the seniority provisions of a collective bargaining agreement without the union's consent, took precedence over the collective bargaining agreement. Both arbitrators found that the company breached the collective bargaining agreement by acting in accordance with the conciliation agreement. They differed, however, in whether back pay should be awarded to employees laid off in compliance with a conciliation agreement which a district court declared was enforceable. The Fifth Circuit and this Court found that the collective bargaining agreement took precedence over the conciliation agreement and upheld the ruling of the second arbitrator who had awarded back pay. In *Connecticut Light & Power*, the issue was whether the company could unilaterally change the size of work crews. The arbitrators differed on whether this "management prerogative" was circumscribed by the "safety provisions" of the collective bargaining agreement. The union filed a grievance each time a reduced crew was sent out. Hence, the conflicting arbitration awards required judicial resolution. (Ultimately, the Second Circuit upheld the ruling of the second arbitrator who found in favor of the company.)

bitrators will decide differently on identical issues. Hence, unless the conflict is one that results in a "cease and desist" order *binding the parties in the future*, courts have traditionally upheld and should continue to enforce any arbitration award that meets the criteria of the *Steelworkers Trilogy*. Thus, an inherent product of the flexibility of the collective bargaining *process* is the flexibility of *arbitration awards*, which includes permissible inconsistency.

Decisions affecting employee benefit rights, especially coverage under a collective bargaining agreement, require consistency and finality. Conflicting arbitration decisions on coverage could not only affect an employee's ability to obtain vested pension rights (based on past industry service and current service in covered employment); they could actually result in breaks in service and forfeitures. Moreover, conflicting arbitration decisions concerning coverage could adversely affect the fund's perception of its contribution base and hence the actuarial assumptions that form the predicate for funding policy. Since different and conflicting arbitration awards on identical contractual issues are not only possible but enforceable, trustees cannot *rely* on them in making long-term decisions. While conflicting awards would be less likely under contracts having area or national grievance committees, and while district courts are not bound to each other's decisions, trustees should be allowed to choose for themselves a forum that affords the possibility of greater consistency and greater finality, a forum that is governed by principles of *stare decisis, res judicata,* and *collateral estoppel;* a forum prepared to dismiss as a matter of course claims that are *patently frivolous;* and a forum whose initial judgment permits a more thorough review — namely, a federal district court!

In sum, Petitioners' argument is correct! Respondents *are* seeking a *procedural right* that is greater than the one available to the employer or the union. However, the right to federal court protection is warranted by the Trustees' status as unique third-party beneficiaries under *Lewis* v *Benedict*, by the number of participant rights they are bound to protect (ca. 500,000), and by the statutory origin of the rights they are both exercising and protecting.

ii. The Trustees are not seeking greater substantive rights than those afforded by the collective bargaining agreement

Petitioners' arguments are premised on the assumption that an employer's substantive obligations will be *increased* if courts, rather than arbitrators, are permitted to resolve disputed terms of collective bargaining agreements. Petitioners' Amici have gone so far as to state that *only* arbitrators can resolve disputes involving the pension and health and welfare provisions of collective bargaining agreements and that such issues are beyond the competence of judges and juries (Brief of Amici, pp. 2, 9-10). There is no authority for such a proposition.

Courts obviously interpreted collective bargaining agreements long before Congress enacted Section 203(d) of the LMRA and this Court decided the *Steelworkers Trilogy*. What, indeed, was the point of Congress's enacting Section 301(a) of the LMRA giving federal courts jurisdiction to hear suits based on breaches of collective bargaining agreements if Congress believed that courts are incompetent to interpret such documents? Moreover, how can such an approach be reconciled with the fact that some collective bargaining agreements do not have a mandatory grievance/arbitration clause or *exclude* some disputes from its coverage? In this regard it cannot be overemphasized that exhaustion is generally required in 301(a) actions *not* because courts are incompetent to interpret collective bargaining agreements *de novo* but because *grievance/arbitration clauses are themselves part of the contract and hence susceptible to enforcement. Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

It may also be noted that the right to arbitrate can be waived. In *Laborers Health and Welfare Trust Fund* v. *Kaufman & Broad*, 707 F. 2d 412 (9th Cir. 1983), the trustees filed suit in state court to collect contributions on behalf of employees performing "callback work." (An audit revealed that the employer was using non-union employees for this work and was not remitting contributions on their behalf.) The employer removed the action to federal district court and moved for summary judgment on the grounds that the work

was not covered by the collective bargaining agreement. Alternatively, the company argued that "callback work" was not within the jurisdiction of the union. Thus, the dispute was subject to the exclusive jurisdiction of the NLRB. The district court rejected this argument but found that the work was not "covered." The Ninth Circuit affirmed the district court's assumption of jurisdiction on grounds peculiarly analogous to those the Trustees are asserting here: "The primary jurisdiction rationale is inapplicable where the injured party bringing the suit has no acceptable means to invoke the Board's jurisdiction and cannot induce its adversary to do so." In other words, since the Trustees had no standing to apply to the NLRB for relief, their 301(a) action was not subject to dismissal. The court of appeals remanded the covered dispute to the district court, having found its grant of a summary judgment unwarranted in the circumstances. The court also rejected the fund's request for arbitration, plaintiff's "suddenly discovered affection for arbitration" having come too late (after seven months of district court litigation)! Having deemed the right to arbitrate waived, the Ninth Circuit evidently believed the district court was equipped to resolve the issue of whether employees who performed "callback work" were covered by the collective bargaining agreement and hence entitled to contributions. (It should be noted that Petitioners have cited this case as one of the four circuit decisions in conflict with that of the Eighth Circuit! Admittedly, the Ninth Circuit did give approval to *Howard Martin* in a footnote, though it failed to apply its reasoning in any manner whatsoever.)

Both the Sixth and the Ninth Circuit Courts of Appeal have provided guidelines for the judicial interpretation of collective bargaining agreements. *UAW* v. *Yard Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983); *Kemmis* v. *McGoldrick*, 706 F.2d 993 (9th Cir. 1983). *See also Syufy Enterprises* v. *Northern California State Association of IATSE Locals*, 631 F.2d 124 (9th Cir. 1980).

Petitioner Schneider has devoted a number of pages of its Brief (pp. 22-24, App. 6-15) to illustrate that the collective bargaining agreements in question are particularly ambiguous

and are "therefore for an arbitrator, not a federal court" to resolve (p. 22). The Eighth Circuit did not find the disputed terms sufficiently ambiguous to require the industrial expertise of an arbitrator. Indeed, a first year law student would be able to make the "incredible" distinction between an employee *hired* on a "part time" basis (not eligible for contributions) and a *regular* employee who *happens to work part-time* because of his employer's fluctuating needs (who is entitled to contributions). (*See, supra,* p. 2, fn. 2 and p. 3, fn. 4.) It cannot be seriously contended that a federal district court could not "unravel" the ambiguities; that such adjudication would "upset" the agreement between the parties to the contract, or would "ignore" their intent, as Petitioner Schneider contends (p. 18).

In any event, the issue before this court is not whether Schneider's "extras" are entitled to contributions but, rather, what *forum* is entitled to make this decision. This is a far cry from suggesting that the Trustees are attempting to *determine for themselves who should be covered.*

II. MANDATORY DEFERRAL TO INTRACONTRACTUAL MECHANISMS WHICH CAN BE INVOKED ONLY BY THE UNION ON *BEHALF* OF THE TRUSTEES IS CONTRARY TO NATIONAL PENSION POLICY

The crux of the issue before this Court is whether it is reasonable to require employee benefit fund trustees to exhaust intracontractual mechanisms to which they have no access and which require the efforts of a union on their behalf. The Eighth Circuit determined that compulsory exhaustion in these circumstances created specific dangers for the Funds and was inconsistent with Congressional intent and national pension policy. The Eighth Circuit's reasoning was followed by the Fifth and the Third Circuits.

The present split in the circuits was spawned in 1980 when the Seventh Circuit decided *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin*, 625 F.2d 171 (7th Cir. 1980). In *Howard Martin, supra*, a panel of the Seventh Circuit decided that if a question of employee cover-

age under a collective bargaining agreement was raised, an employer could not be regarded as "delinquent" for the purposes of a trustee action until the contract was *first interpreted through the appropriate grievance mechanism*. In other words, the trustees could not go directly to court to have such contractual disputes adjudicated. (The issue in *Howard Martin* was whether "emergency" or "temporary" employees were "covered" by the contract and hence eligible for contributions.)

The court's interpretation of the term "delinquent" clearly departs from standard English usage. *Black's Law Dictionary*, for example, defines the word "delinquent" as follows: "as applied to a debt or claim, it means *simply due and unpaid at the time of law or fixed by contract*" (1979, emphasis supplied). The *American Heritage Dictionary of the English Language* defines the term "delinquent" as "overdue in payment" as in "a *delinquent* account" or "failing to do what is required by law or obligation" (1978). These definitions comply with the language of the Central States Trust Agreements: a delinquent contribution is one not paid in accordance with the time limits fixed by the Trustees (*see* Article III, Section 2, J.A. 21). This is also the meaning intended in 29 U.S.C. § 1145 which gives plan trustees a cause of action if contributions are not remitted in accordance with "the terms of the plan or under the terms of a collectively bargained agreement." There is nothing in ERISA, the Trust Agreements, or, indeed, in Howard Martin's collective bargaining agreement that defined a "delinquent" contribution as one either "conceded to be such" by the employer or "determined to be such by an arbitrator." The same is true of the instruments in the case at bar. Nevertheless, Prosser states at page 16 of its Brief that "unless and until the union successfully prosecutes the grievance, there is no breach of the contract for which the Trustees can sue." Hence, if the union does nothing, does not *raise* a grievance, there is presumptively no "delinquency," nothing to arbitrate, and no basis for filing suit since the proposed condition precedent would not have been satisfied, notwithstanding the Trustees *complaint* states that *payments due were not timely made*. This approach in the context of ERISA is totally without merit since it leaves the union in

absolute control of whether a collection action will or will not be filed.

The Seventh Circuit then compounded its distortion of the terms "delinquent" and "delinquency" by *ignoring the language* of the grievance/arbitration clause of the National Master Freight Agreement, namely, that its mechanisms could be set in force "*only by the authorized Union representative or the employer*" (emphasis supplied).[20] Although the court acknowledged the *existence* of this language, it nevertheless rejected as meritless the Fund's contention that the Trustees should not be required to exhaust mechanisms which they were not contractually empowered to invoke. The court stated:

> The argument falls of its own weight, however. To trigger the arbitration process, the Funds need only inform the Union, the members of which the funds exist to serve, that Martin disputes the coverage of certain workers and ask the Union, the organization of primary interest, to file a grievance against Martin.

In so concluding, the Seventh Circuit not only ignored an express provision of the collective bargaining agreement, it also failed totally to examine the implications of its decision for the mandate of trustee independence. Nevertheless, the Funds sent the appropriate union the relevant records, informed it of the coverage dispute, and requested it to take appropriate action.

The Funds filed suit to collect delinquent contributions from Howard Martin in 1979; the Seventh Circuit required deferral to arbitration in July, 1980. On October 13, 1982, when the Eighth Circuit *en banc* heard oral arguments in the case at bar, Howard Martin's arbitration still had not occurred. Howard Martin was placed in involuntary bankruptcy in

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[20] The court also disregarded the fact that the grievance clause of the Supplemental Agreement to the National Master Freight Agreement, to which Howard Martin was bound, specifically excluded from its coverage and therefore from the union's no-strike obligation the issue of delinquent contributions to the pension and health and welfare funds. The other mistaken assumptions were set forth in Respondents' Brief in Opposition to Petitions for Writs of Certiorari, p. 10, fn. 6.

early 1983 (*S.D.F. Inc., d/b/a Howard Martin*, IP83-1160-B (Bankr. Indianapolis, Indiana 1983, leaving the Trustees, as unsecured creditors, with a probably uncollectible proof of claim including $113,000.00 relating specifically to delinquencies involving unadjudicated "coverage dispute"). Thus, *mandatory deferral* is no guarantee of prompt dispute resolutions affecting employee benefit funds, and the Trustees' concerns in this regard are anything but *purely speculative*, as Prosser asserts (p. 35).

Moreover, direct access to a judicial forum by *fund trustees* (as opposed to *individual employees*) will not have the effect of turning the federal judiciary into "small claims courts," as reasonably feared by Chief Justice Burger in his dissenting opinion in *Barrentine* v. *Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 746 (1981).[21] Numbers such as those in *Howard Martin* and *Laborers* v. *Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983) ($131,887.68), speak for themselves, though numbers alone are, of course, not dispositive of the Trustees' right to file suit. Normally complaints are not filed until other efforts to resolve disputes have failed. Fund trustees required by 29 U.S.C. § 1104(a)(1)(A)(ii) to defray the costs of administering the plans reasonably are *not* only *prohibited* from filing frivolous lawsuits but are now permitted to refrain from filing lawsuits based on an analysis of the merits of the legal issues involved and the collectibility of the delinquent employer (DOL and IRS Reg. 76-1, 41 F.R. 12740).

The Eighth Circuit carefully examined the relationship between unions and trust funds and the policies that led

[21] Prosser, at p. 27, has cited statistics showing that the total number of civil cases filed has risen 14.2% from 1981 to 1982 and the number of cases filed under labor statutes rose 10% during the same period. To the extent that the statistics cited are meant to infer that the increase in cases filed is attributable to collection cases under ERISA, the inference is erroneous. The Annual Report of the Director, Administrative Office of the U.S. Courts, states, "The nationwide increase of 14.2 percent in civil cases filed occurred primarily because of a 30.0 percent rise in cases in which the U.S. government was plaintiff" (p. 4, 1982). Further, the category of cases filed under labor statutes includes cases filed under *all* labor statutes; it certainly does not distinguish between actions filed under ERISA for benefit claims or actions filed under ERISA by trustees for the collection of delinquent contributions. Thus, at best the statistics are inconclusive. *See also the* Affidavit of Donald Weyerich (App. E) which rebuts the erroneous statements imputed to him on pp. 27 and 28 of Prosser's Brief.

Congress to require total independence between the two. The notion of independence and absolute trustee neutrality was unequivocally confirmed by this Court in *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982) and *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981). Although employee benefit law is still in its genesis, two pronouncements from this Court have emerged with striking clarity: trust administration is qualitatively different from collective bargaining and trustees must function independently in order to fulfill the neutral fiduciary role Congress has assigned to them. Indeed, the very concept of forced reliance on unions whose interests may not always coincide with those of the funds and over whom the trustees have no control cannot be reconciled with the fact that fund trustees stand completely outside of the collective bargaining process, are not the agents of those who appoint them, owe undivided loyalty to participants and beneficiaries, and must maintain strict neutrality with uncomprising rigidity. *See NLRB* v. *Amax Coal Co., supra.*

Mandatory deferral to an arbitration process which they cannot invoke places fund trustees in just such a position of involuntary reliance. As the Fifth Circuit recently noted: "By carelessness or deliberate refusal to act, the Union could completely thwart the Trustees' ability to administer and ensure payments to the trust funds. Though in full possession of their fiduciary duties, the Trustees could exercise their fiduciary powers only at the Union's discretion. Such a situation would completely violate the Congressional directive that control of fringe benefit funds shall not rest with the unions." *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426, 1432 (5th Cir. 1983). (Although Schneider suggests that the Fifth Circuit only treated the issue of mandatory deferral "tangentially" (p. 44), the *Bugher* court decided a number of issues closely related to ones in the case at bar, carefully compared the Eighth Circuit's rationale with that of the Seventh Circuit in *Howard Martin*, and *explicitly* found the former approach "more persuasive.")[22]

[22] Schneider's interpretation of the *Bugher* case misperceives the facts and issues involved. *See* Bugher's Brief in Opposition to Petition for Certiorari, 83-421. (Petition pending)

The Eighth Circuit set forth a number of concrete and practical reasons why reliance on unions to protect the interests of employee benefit funds and plan participants would be misplaced (A-16-18). Most importantly, the court observed that if money is limited, as it usually is, choices must be made and priorities established. In this situation, the union's primary interest, quite properly, would lie in keeping as many of its members working as possible. Certainly, it would be reasonable for it to seek *first* to protect the wages of active members of the bargaining unit and *only then* to secure the retirement benefits of former employees or their families. As the court noted, the latter persons may no longer be members of the bargaining unit whom the union has an affirmative duty to represent. *See Allied Chemical & Alkali Workers of America, Local 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). Conversely, the trustees of employee benefit funds owe *fiduciary obligations* to *precisely* such persons. Contrary to Prosser's statement (p. 33), it is *only* the Trustees and *not* the union who owe a *fiduciary duty* to active plan participants, retirees, and their families to audit employer records and collect delinquent contributions in the *exclusive interest* of maintaining the solvency of the Funds. *See Rosen* v. *Hotel & Restaurant Employees, Local 274*, 637 F.2d 592 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 398 (1981).

Priorities based on economic necessities are perfectly legitimate. Thus, it is well-established law that the duty of fair representation does not prevent unions from making economic decisions that have differential effects. *See United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982). Indeed, recognizing that such decisions are legitimate, the Third Circuit stressed why union domination of a trust fund would result in precisely the kind of conflict of interest that Section 302(c)(5) of the LMRA was designed to prevent by requiring neutral and independent administration of Taft-Hartley funds. *Nedd* v. *United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977). Unions should not be forced into a position where they must choose whether to press a meritorious grievance on behalf of a benefit fund and possibly put an employer out of business or to allow the delinquencies to accumulate so as not to jeopardize jobs. Independent trustees may not make such choices.

While the union may have a *legal* duty of fair representation to *non-union* members of the bargaining unit, it may lack *incentive* to enforce the collective bargaining agreement on a day-to-day basis *on behalf* of such individuals, not to mention process a benefit fund's grievance on their behalf. An illustrative case is *Manning* v. *Wiscombe*, 498 F.2d 1311 (10th Cir. 1974), in which the Court of Appeals for the Tenth Circuit held that an employer was delinquent for contributions on behalf of non-union members of a bargaining unit even though the contract "from its inception was applied on a 'members-only' basis." The court, noting that a reading of the collective bargaining agreement together with the applicable trust agreement clearly defined covered employees as encompassing non-union as well as union members, stated:

> We must now consider whether the fact that the contract has been applied on a "members-only" basis serves to relieve Wiscombe of the liability imposed under the plain wording of the agreement. The trustee here stands as a third-party beneficiary of the collective bargaining agreement and his rights vested upon the signing of the contract and the creation of the trust fund. The *primary parties cannot modify by subsequent conduct the express terms of an agreement* without the consent of *a third-party beneficiary* whose rights have vested.

498 F.2d at 1313, emphasis supplied.

The *lack of incentive* for a union to process a "coverage dispute" on behalf of trust funds would obviously be even greater where the union is *decertified*. *See*, *supra*, p. 4 and fn. 6.

A further reason why a union might lack the *incentive* to get involved in trustee audit and collection disputes is that arbitration is *costly*. ERISA requires an employer who loses in a collection action to reimburse the fund for its costs and attorney fees. Unions cannot be reimbursed *either* by the fund *or* by the employer. Arbitration of "coverage disputes" in connection with trust fund claims may, for quite practical reasons, not be high on the union's list of priorities. Notwithstanding *Layne Western Co., Inc.* v. *International Union*

of Operating Engineers, 650 F.2d 155 (8th Cir. 1981, overruled by the Eighth Circuit *en banc* in its *Prosser* decision), there is not much evidence that unions tend to strike *as a matter of course* for delinquent contributions, particularly during periods of economic uncertainty and unemployment. As the district court noted in the most recent phase of the *Nedd* litigation, *Ambromovage* v. *Thomas*, (No. 8796, M.D. Pa. 1982), 3 EBC 1873, 1884, an independent trustee would not "be entitled to rely upon the Union as its collection agent; . . . . Even if the Union was willing to exercise its economic power on the trustee's behalf, that willingness would depend on whether the strike was in the interest of the Union membership generally. Because an independent trustee would have realized this, that trustee would be entitled to rely on Union efforts only as a measure secondary to its own efforts."

As suggested in *Manning* v. *Wiscombe*, *supra*, and in *Barrentine* v. *Arkansas-Best Freight Systems, Inc.*, *supra*, unions and employers sometimes engage in "side agreements" in connection with employee compensation. Although this is eschewed by the LMRA and ERISA, "side agreements" or "oral modifications" of the benefit provisions of collective bargaining agreements do occur.[23] *See Lewis* v. *Harcliff Coal Co.*, 237 F. Supp. 6 (W.D. Pa. 1965); *Lewis* v. *Seanor Coal Co.*, 256 F. Supp. 456 (W.D. Pa. 1966), *aff'd*, F.2d 437 (3d Cir. 1967); *Boyle* v. *North Atlantic Coal Co.*, 331 F. Supp. 1107 (W.D. Pa. 1971); *Waggoner* v. *Dallaire*, 649 F.2d 1362 (9th Cir. 1981); *Kemmis* v. *McGoldrick*, 706 F.2d 993 (9th Cir. 1983); *Maxwell* v. *Lucky Construction Co.*, 710 F.2d 1395 (9th Cir. 1983). To date only *two* criminal convictions involving misreporting or other violations of collective bargaining agreements affecting employee benefit funds have been reported: *U.S.* v. *S & Vee Cartage*, 704 F.2d 914 (6th Cir. 1983), and *U.S.* v. *Russo*, 708 F.2d 209 (6th Cir. 1983). The possibility of criminal sanctions for violations of ERISA are not likely to prevent side agreements or other forms of misreporting that

[23] *See* New York Times Article, July 6, 1983, printed as an Appendix to Petitioners' Supplemental Brief in Support of its (pending) Petition for Certiorari in *Central States, et al.* v. *Central Transport, et al.*, 82-2157.

adversely affect employee benefit funds, and hence require a high degree of vigilance from trustees.

What are the funds to do if the union refuses to process a grievance on their behalf? Petitioners appear to believe, as did the *Howard Martin* court and a panel of the Eighth Circuit in *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST*, 641 F.2d 616 (8th Cir. 1981, substantially overruled by the Court *en banc* in *Prosser*) that the union's "duty of fair representation" would impel the union to act. However, the union *has* no "duty of fair representation" *to the Funds and their Trustees*; this Court has precluded such a duty in its *Amax* decision, *supra*. So has Congress in enacting Section 302(c)(5).

If the Trustees file suit to compel an audit or to collect delinquent contributions and a defendant prevails on the affirmative defense of exhaustion because he alleges the existence of a "contract interpretation dispute," there is good reason to believe that the court will *dismiss* the action for lack of subject matter jurisdiction,[24] possibly precluding injunctive relief for the preservation of records and assets. Must the Trustees now file a *new* action seeking the original relief requested and *prove* to the court that the union refused to arbitrate and that the exhaustion requirement is "futile?" Would the standard be as high as it is for an employee who attempts to make the same claim? *See Vaca* v. *Sipes*, 386 U.S. 171 (1967). Would this be *fair* since the union is *not* the exclusive statutory representative of the Trustees? Under what authority could the Trustees simply *compel* the union to arbitrate? Could they, like an employee, file a *301(a) action* to enforce the grievance/arbitration clause of a collective bargaining agreement when they are not a *party* to the contract and when they have expressly denied that this clause has any application to them? Neither Petitioners nor those courts in opposition to the Eighth Circuit's approach have answered these questions on the basis of statutes or case law. Nor have they considered the risks of delay that mandatory deferral could cause.

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[24] This occurred in the cases at bar and in *Howard Martin*.

In a very recent decision, a panel of the Court of Appeals for the Third Circuit expressly adopted the approaches taken by the Eighth and Fifth Circuits for *all* of the contractual and policy reasons already discussed, rejecting the proposition (suggested in Chief Judge Seitz's separate concurring opinion) that the "Trustees should be free to initiate their own action *only* where a conflict of interest makes it *unlikely* that the union will arbitrate the Trustees' claim in good faith," *Trustees of Local 478 Pension Fund, et al.* v. *Siemens*, No. 82-5719 (Nov. 18, 1983). The court stated:

> . . . We share the Chief Judge's reluctance to widen federal trial court jurisdiction at the expense of the valuable processes of arbitration. We believe it is preferable to follow the "bright line" approach established here [direct access to federal courts] for a number of reasons. First, the other approach would create an ancillary issue of the union's ability to arbitrate in good faith in every suit brought by the Trustees, making the union a necessary, if not indispensable, party to every Trustees' suit. The preliminary inquiry into the existence of actual or potential conflict between the trustees and the union would generate more trial court activity than it would abate and would, in many instances, be more extended and complex than resolution of the merits of the employer's asserted obligation to the pension fund. Second, the issue of good faith would be, by its very nature, divisive and would unnecessarily pit the Trustees and the union as opponents. Third, proof of the ability to arbitrate in good faith may often be speculative and difficult, leaving the trust beneficiaries inadequately protected against those conflicts of interest that may be subtle, or as yet unrevealed. For these reasons, we have opted for a generally applicable rule under which the litigation would be limited to the relevant issue of the company's obligation to make the payment. (114 L.R.R.M. 3406, emphasis supplied)

In addition to these troublesome *legal* issues, there would be very *practical* difficulties in following-up union activity if unions were compelled to invoke the contractual grievance mechanism of their collective bargaining agreements. As noted earlier, some 12,000 employers in 40 states contribute to the

Central States Funds pursuant to thousands of collective bargaining agreements with hundreds of different local unions. The Funds themselves have their headquarters in Chicago. The administrative burden and cost of follow-up would be substantial.

Another procedural difficulty facing the Trustees is that they may not know that an employer will dispute a "contract term" until a complaint has been filed and the answer received. The proper time for an employer to raise these issues would be immediately following an audit or a notice of delinquency from the Fund, namely, at a time when the employer, the union, and a Fund representative could discuss the dispute informally and attempt to resolve it without incurring litigation costs, which would also accommodate the policies of the LMRA and ERISA. The *Howard Martin* approach, which permits of belated exhaustion defenses, clearly poses a threat to fund assets and also burdens the judiciary with futile litigation.

As this Court acknowledged in *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, (1982), Congress expressly wanted to streamline and "simplify delinquency actions." Direct access to federal courts, e.g., the "bright line" approach advanced by the Third Circuit, will effectuate congressional intent.

III. IN ENACTING ERISA, CONGRESS DID NOT INTEND OR PROVIDE FOR THE ARBITRATION OF TRUSTEE AUDIT AND COLLECTION ACTIONS; MANDATORY DEFERRAL IS CONTRARY TO NATIONAL PENSION LAW

Where Congress has chosen to address itself to arbitration, it has done so directly and not by inference. With regard to the LMRA, Section 203(d), as noted above, merely expresses Congress's declaration that it is *desirable* for parties to collective bargaining agreements to *agree upon methods* for the final resolution of disputes arising over the interpretation or application of these contracts. *No* court has construed Section 203(d) to require *compulsory arbitration*. Indeed, such a construction would render Section 301(a) of the LMRA meaning-

less except as a vehicle for enforcing grievance/arbitration clauses or arbitration awards. However, Section 301(a) expressly confers federal jurisdiction to hear "suits for violation of contracts" between employers and unions without limitation even on the amount in controversy or citizenship of the parties. The requirement of exhaustion stems exclusively from the particular collective bargaining agreement in dispute and not from the statute.

In contrast to Section 203(d), which merely expresses a Congressional *preference*,, Section 302(c)(5)(B) of the LMRA *requires* the appointment of "an impartial umpire" to break deadlocks between employer and employee trustees either by agreement or, upon petition of either group, by appointment of the district court in which the trust fund has its principal office (App. A). The purpose of this provision, of course, is to ensure that boards of trustees will not be stalemated in their exclusive administrative functions. (The Trust Agreements of the Central States Funds contain a parallel provision for the breaking of trustee deadlocks (J.A. 19-20).) This provision would not require a board of trustees who, by majority vote, have authorized the institution of a lawsuit against a contributing employer to defer to the arbitration provision of the *employer's* collective bargaining agreement because of a disputed contract term;[25], contrary to Prosser's belief (pp. 28-31), 302(c)(5)(B) has *nothing* to do with the issue at bar.

With regard to ERISA, the following statement appeared in Senate Report No. 93-383 (August 21, 1973): "It is intended that under the rule which prohibits a fiduciary from jeopardizing the income or assets of a plan, fiduciaries will be subject to the usual trustees' duties such as (but not limited to) the duty to . . . *enforce claims of the plan*" (I *Leg. Hist. of ERISA*, Pub. L. No. 93-406, pp. 1172-1173 (1976), emphasis supplied). Legislative history contains *no* references to the arbitration of *trustee claims against employers on behalf of the plan*. The few references to arbitration that do exist refer to the arbitration of *employee benefit claims*. Where this was not possible under the grievance/arbitration provisions of a

[25] *Cf. Farmer* v. *Fisher*, 586 F.2d 1226 (8th Cir. 1978, substantially overruled by the Eighth Circuit's decision in *Prosser*).

collective bargaining agreement, Senator Hartke proposed that hearings should take place under the authority of the Secretary of Labor in accordance with rules and regulations to be promulgated by him in accordance with the Administrative Procedures Act (I *Leg. Hist. of ERISA*, pp. 1244-1247). The final conference report on ERISA (H.R. 2), as announced by Senator Javits on August 22, 1974, contained the following paragraph:

> **ARBITRATION OF BENEFIT CLAIMS**
>
> The Senate bill provided that each plan was to incorporate a procedure for arbitration of benefit claim disputes between the plan and participants and beneficiaries. The House bill contained no comparable provision. House conferees were opposed to the Senate provision on grounds it might be too costly to plans and a stimulant to frivolous benefit disputes, and at their insistence it was dropped in conference. I regret this decision since I believe the Senate bill would have provided a relatively inexpensive way for the resolution of minor benefit disputes for the many participants and beneficiaries who lack the resources to pursue their claims through the court. Nevertheless, I am encouraged that the conferees agreed to direct the Joint Pension Task Force to study the feasibility of this approach further, and by the acceptance of provisions contained in the original Williams-Javits bill that would require a full and fair claims procedure—section 503— as well as the provisions authorizing the Secretary of Labor to enforce benefits denied in violation of law—section 502(b).

III *Leg. Hist. of ERISA*, p. 4769 (1976). The Senate unanimously agreed to the Conference Report on H.R. 2, and the President signed ERISA into law on September 2, 1974.

The language of ERISA speaks for itself: 29 U.S.C. § 1001(b) provides "ready access to the Federal courts." Contrary to Prosser's contention (p. 41) this provision was not in any way intended to be limited to participants and beneficiaries. In the first place the emphasis here is on "federal" courts. Plan participants and beneficiaries have "*ready* access to *Federal* courts" only under 29 U.S.C. § 1132(a)(1)(A), (a)(2)

or (a)(3)(A) and (B), e.g., in actions against trustees for the refusal to disclose required information and other violations of ERISA. In pursuing *claims for benefits* under 29 U.S.C. § 1132(a)(1)(B), participants may invoke the aid of *state* as well as federal courts (29 U.S.C. § 1132(e)(1)). In addition, exhaustion of internal plan review and appeal procedures under 29 U.S.C. § 1133 is required as a condition precedent for filing an action in *any* court under 29 U.S.C. § 1132(a)(1)(B). This is similar to the exhaustion requirement imposed on individual employees pursuing claims covered by the grievance/arbitration clauses of collective bargaining agreements as a condition precedent to filing an action for breach of contract under Section 301(a) of the LMRA. ERISA does not impose a similar exhaustion requirement on trustees ("fiduciaries"). Moreover, trustees bringing actions under 29 U.S.C. § 1132(a)(3)(A) and (B) may do so *only* in *Federal* court (29 U.S.C. § 1132(e)(1)).Clearly, if anyone has "ready access" to federal courts, it is plan fiduciaries (trustees) pursuing *claims on behalf of the plan*. To put it somewhat differently, since Congress intended that the *enforcement of plan claims* is a "trustee duty," *supra*, and since 29 U.S.C. § 1105 makes "trustee responsibilities" *nondelegable*, mandatory deferral as a condition precedent to federal court litigation directly conflicts with legislative history and the text of the statute.

The exhaustion doctrine is particularly inconsistent with national pension policy as reflected in the Multiemployer Pension Plan Amendments Act of 1980 (Pub. L. No. 96-364), an Act in which Congress undertook to make some fundamental revisions of ERISA.

ERISA did not cure the problem of delinquent contributions. Indeed, in the six years following its enactment, the problem of delinquent contributions assumed such magnitude that Congress *created a new and distinct federal cause of action for their collection* (29 U.S.C. § 1145). As noted above, stringent new remedies, including double interest, liquidated damages, costs, and attorney fees were *mandated* if trustees prevailed in a collection action in *federal* court. It was believed that this would encourage correct reporting and deter

evasions. It was at this time, too, that Congress *withdrew* from the Secretary of Labor his power to collect delinquent contributions, thus placing the burden squarely on trustees. 29 U.S.C. § 1132(b)(2).

Had Congress intended to inject arbitration into the ERISA collection scheme, it had a perfect opportunity to do so in enacting MPPAA, for it provided a comprehensive scheme for the arbitration of disputes concerning employer withdrawal liability. Even here, however, the drafters of the Act contemplated a quasi-judicial type of proceeding, as evidenced by Rep. Frank Thompson's explanation to the House of Representatives:

> The committees intend *that the role of the arbitrator under this Act will be similar to that of a judge applying applicable law to the facts presented, and not a mediator attempting to reconcile competing interests*. In arbitration proceedings under various labor laws, issues are often compromised, in part so as to avoid damaging ongoing relationships between management and labor. Unlike proceedings of that type, the proceeding contemplated by the committees is intended to resolve disputes, to the extent possible, in favor of one of the parties rather than in favor of compromise. 126 Cong. Rec. (House) 23039 (August 25, 1980)

Arbitration in the context of resolving withdrawal liability disputes primarily involves the application of complex and technical statutory formulae to closed transactions and/or tests the reasonableness of a plan's actuarial assumptions in accordance with procedures being designed by the PBGC (29 U.S.C. § 1401(a)(2)).[26] Clearly, arbitration in this context is not part of an ongoing process of collective bargaining; does not give added content to open-ended collective bargaining agreements; and has no effect on the maintenance of industrial peace. Moreover, it is up to the *employer* to request arbitration; if a company does not request this form of review, the withdrawal liability and payment schedule determined by the

[26] The PBGC has already issued proposed Regulations on Arbitration of Disputes *in Multiemployer Plans, 48 F.R. 31251, July 7, 1983.* On information and belief final regulations on arbitration procedures will appear during the first few months of 1984.

trustees is *presumed* correct and payments are collectible in the same manner as delinquent contributions (29 U.S.C. § 1401(b)(1)). In short, there is no requirement for *mandatory arbitration* even here.

The fact that Congress provided for arbitration in the context of withdrawal liability but omitted it from its revision of provisions relating to delinquent contributions (29 U.S.C. §§ 1145, 1132(g)(2)) gives rise to the *inference* that mandatory deferral of trustee collection actions to the grievance mechanisms of collective bargaining agreements was not intended. More than that, legislative history actually fills the silence left by the text of the statute itself. As noted above, *supra*, p. 33, Congress intended to simplify delinquency collections and narrow the defenses available to employers resisting such actions to those based on violations of Section 302 of the LMRA (29 U.S.C. § 186). Exhaustion is *not* one of these defenses.

The Eighth Circuit concluded that "national pension policy" and "the rights of plan beneficiaries can be vindicated as Congress seems to have intended only if trustees are given a direct right of access to the courts" (A-18). This conclusion is correct and should be affirmed.

IV. TRUSTEE-INITIATED AUDITS TO VERIFY THE ACCURACY OF REPORTING ARE PURELY MATTERS OF TRUST ADMINISTRATION AND ENTIRELY OUTSIDE OF THE SCOPE OF THE COLLECTIVE BARGAINING PROCESS: MANDATORY DEFERRAL OF ISSUES ARISING IN THIS AREA IS INAPPROPRIATE AND CONTRARY TO NATIONAL PENSION POLICY

As the Eighth Circuit noted, the gravamen of the Trustees' dispute with Prosser concerned the right to conduct an audit as well as its permissible scope.

The contractual authority for the Trustees' right to audit the records of contributing employers is Article III, Section 5, sentence 2 of the Trust Agreements governing the Funds (J.A. 23). This provision authorizes the Trustees, by their representatives, to inspect "pertinent records" at the employer's place of business if deemed necessary for the proper administration of the trust. The statutory basis of this right is primarily 29 U.S.C. § 1104(a)(1)(B), the "prudent man" rule of ERISA

(App. B). Since ERISA requires pension funds to credit an employee with service toward the vesting of his benefits even where his employer never remitted contributions (App. C,D), audits to verify the accuracy of reporting play a particularly vital role in trust administration. As the Third Circuit observed, only fund trustees can adequately monitor employer contributions; unions are not in an informational position to do so. *Rosen* v. *Hotel and Restaurant Employees, Local 274*, 637 F.2d 592 (3d Cir. 1981); *see also Nichols* v. *Trustees of Asbestos Workers Pension Plan*, (No. 80-563, D.D.C. 1982), 3 EBC 1726.

Pursuing the goals set forth in ERISA and carrying out the tasks imposed upon them by the Act, the Central States Trustees determined on the basis of years of experience in trust administration that random general audits of participating employers' tax and payroll records are the single most reliable and effective means of uncovering delinquent contributions and identifying potentially eligible plan participants.

When Prosser executed collective bargaining agreements with Local 610, the company clearly agreed to be bound by the Trust Agreements governing the Funds and the acts of the Trustees. Hence, Prosser agreed not only to produce records but to abide by the Trustees' construction of the term "pertinent records." Nevertheless, Prosser persuaded the district court that the following issues were arbitrable:

> "1) Whether the Trustees have the right to demand inspection of the employment records of 'all employees covered by the collective bargaining agreements,' including those categories of employees for whom contributions are expressly excluded;
>
> 2) Whether the trustees have the right to seek to recover contributions, and to inspect records, pertaining to the period prior to February 28, 1979, when the Union and Prosser entered into a new collective bargaining agreement in reliance upon their understanding and interpretation of the prior agreement and the manner in which contributions were made pursuant thereto; and
>
> (3) Whether the trustees have the right to seek to recover contributions, and to inspect records, prior to January 4, 1978, since on that date a Union complaint to the National Labor Relations Board, alleging Prosser's refusal to allow

an audit of its records, was dismissed due to the Union's refusal to arbitrate (Brief, pp. 6-7).

The district court's dismissal was clearly erroneous.

Issues (2) and (3) are manifestly *legal* issues to be resolved by a court not an arbitrator: i.e., the appropriate statute of limitations for Trustee audit and collection actions initiated under the authority of the Trust Agreements; the binding effect of an NLRB order affecting the union involving a transaction to which the Trustees were not a party. The first issue (1) was likewise subject to judicial review: i.e., whether the Trustees' request for access to records of *all* employees was arbitrary and capricious.

It is well-established law that courts may not substitute their judgment for that of the trustees whether in the construction of the terms of the trust agreements from which their contractual authority derives or in implementing the "prudent man" rule of ERISA unless the trustees' conduct has been arbitrary and capricious. *Rehmar* v. *Smith*, 555 F.2d 1362, (9th Cir. 1976); *Gorman* v. *ILWU-PMA Benefit Funds*, 616 F.2d 433, (9th Cir. 1980); *Elser* v. *I.A.M. National Pension Fund*, 684 F.2d 648, (9th Cir. 1982); *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977). While Respondents have *never* contended that coverage disputes of the type involved in the Schneider litigation are *not* suitable for arbitration in a dispute between the employer and the *union* (and should have been resolved between the parties long before this litigation commenced),[27] they have always maintained and do insist that the parties to a collective bargaining agreement have no right to attempt to interpret the provisions of the Trust Agreements governing the Funds when these agreements have accorded this right *exclusively* to the Trustees themselves (Article IV, Sec. 17, J.A. 26-27). Indeed, the thought of 12,000 employers each attempting to determine what records should be produced upon a request by the Trustees for a standard, routine audit does not even bear consideration. There is no authority for the proposition that the mere incorporation by reference of a trust agreement in a collective bargaining agreement *automatically* subjects the trust agreement to the grievance clause of the incorporating document. *See United Steelworkers* v. *General Steel Industries*, 499 F.2d 215 (8th Cir. 1974).

[27] Schneider's allegation on this point on page 14 of the Brief is absolutely unfounded

Although the *merits* of the audit dispute were not before the Court of Appeals, a consideration of the function of Central States' audits and a few facts concerning the operation of the Funds (which were presented to the Court in Appellants' Briefs) reveal why arbitration of audit issues is particularly inappropriate.

An employer's obligation to contribute to Central States is established in the collective bargaining agreement, which the Trustees of the Funds have no role in negotiating. Upon contractually agreeing to participate in the Central States trusts, the employer submits a list of employees "covered" by the collective bargaining agreement and "eligible" for contributions. This is known as the "base group." Thereafter, Central States must rely on the employer to accurately report fluctuations in the base group, for example, by adding newly hired "covered" employees as well as by reporting terminations.

Because of the size of the Funds and the geographical distribution of their constituency, reporting and the remittance of contributions depend on an honor system. Since the Central States Funds are based in Chicago, Illinois, there is no way for the Trustees to physically monitor employer reporting absent a field audit program (similar to that of the IRS) to verify that the reported amounts are correct.

While many employers report correctly, substantial discrepancies do occur, typically underreporting and nonreporting. An employer who "underreports" fails to contribute appropriately on behalf of employees he *concedes* are covered by the collective bargaining agreement and whom he has at some time reported to the Funds, whether by including them in the base group or by subsequently adding their names on monthly reporting forms. An audit of the records of concededly covered employees, as Prosser would advocate, would uncover this kind of misporting.

An employer who engages in the practice of "nonreporting" simply omits covered employees from the base group and never subsequently reports them to the Funds, thus eroding the actuarial solvency of both Funds and potentially increasing the unfunded vested benefits liability of the Pension Fund.[28]

[28] Unfunded vested benefits liability is the amount by which nonforfeitable benefits exceed fund assets. (29 U.S.C. § 1393 (c))

Audits limited to the records only of concededly covered employees clearly cannot detect or remedy nonreporting.

Numbers best illustrate the magnitude of the problem of nonreporting. If only 10% of the 12,000 employers in the pool omit only one single employee from their contribution reports, the annual loss of income to the Pension Fund would be approximately $2,745,600.00 ($44.00 per week per employee x 52 weeks x 1,200 employers).[29] Multiply even a fraction of this figure by 2,000 pension funds in the United States and the potential net loss is staggering.

Random audits of participating employers' records are intended to encourage accurate reporting, to deter contractual and statutory evasions, to protect the benefit status of all eligible plan participants, and to mitigate losses of fund assets. Moreover, they are designed to intrude as little as possible on privacy rights.

In a typical audit "pertinent records" relating to allegedly noncovered employees are limited. The auditors compare payroll registers with IRS 941 forms in order to verify that they are dealing with a "complete" employee population and that there are no missing payrolls or cash disbursements. Total dollar figures rather than individual earnings are of prime importance. If the totals match, the auditors spot-check personnel files of allegedly noncovered employees. If, on the basis of this spot-check, it appears that employees listed on the payroll for noncovered employees do not in fact perform bargaining unit work, that is the end of the audit as far as this group is concerned. Even with regard to the covered employees, the audit is limited to essential records: if two documents verify the accuracy of reporting, four will not be demanded.

Substantial safeguards are also offered to protect confidentiality. However, in accordance with standard auditing principles, which require at least some independent verification, the audit cannot be limited solely to employer-selected records of one segment of his work force, for example, the records of those employees the employer *concedes* are covered by the collective bargaining agreement. If limited only to these records, the Trustees might never discover the existence of

[29] This computation is based on the current average contribution rate.

covered employees the employer did not report in the first place, or they might discover them only at some later time when the employer was already out of business or bankrupt, thus precluding a recoupment action.

Given the importance of audits, their scope should only be limited, if at all, then only by a court.[30]

CONCLUSION

The cases relied on by Petitioners in support of their position do not require reversal of the Eighth Circuit's *en banc* decision. Respondents have already set forth in detail why the reasoning of the Seventh Circuit in *Howard Martin* conflicts both with decisions of this Court and with national pension and labor law and policy. In *Trustees of National Benefit Fund, etc.* v. *Constant Care Community Health Center, Inc.*, 669 F.2d 213 (4th Cir.), the Fourth Circuit's approval of *Howard Martin* was dictum since it decided that a "simple" collection action was before the court which did not require arbitration. *Laborers Health and Welfare Trust Fund* v. *Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983), is inapposite for a variety of reasons: the Trustees themselves *requested* arbitration; the court remanded a "coverage dispute" to the district court for trial because it found the Fund's "right" to arbitrate waived; the court approved of *Howard Martin* in dictum and yet held at the same time that the "primary jurisdiction" rule could not apply to a trust fund which had no access to the NLRB and could not obtain relief from it. *Central States, Southeast and Southwest Areas Pension Fund, et al.* v. *Central Transport*, 698 F.2d 802 (6th Cir. 1983), did not involve a choice of forums at all; the Court of Appeals for the Sixth Circuit itself limited the scope of the audit requested, never suggesting the dispute was arbitrable.

In contrast, the Fifth, Third, and Eighth Circuits carefully analyzed ERISA, the LMRA, federal labor and pension policy, and recent decisions of this and other courts. These courts all rejected the concept of mandatory deferral. For all the reasons set forth in this Brief, the decision of the Court of Appeals for the Eighth Circuit should be affirmed.

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[30] The scope of a proposed Central States' audit was *judicially* limited by the Court of Appeals for the Sixth Circuit. A Petition for a Writ of Certiorari is pending. *Central States, et al.* v. *Central Transport, et al.*, 82-2157.

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NOS. 82-1860 and 82-1862

In the

Supreme Court of the United States

October Term, 1982

SCHNEIDER MOVING AND STORAGE COMPANY,
Petitioner,

and

PROSSER'S MOVING AND STORAGE COMPANY,
Petitioner,

vs.

LORAN W. ROBBINS, et al., TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS,
Respondents.

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APPENDIX A

LABOR-MANAGEMENT RELATIONS ACT OF 1947

§ 173. Use of conciliation and mediation services as last resort

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

§ 186. Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of

such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

Exceptions

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance

to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of

employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided,* That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further,* That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

APPENDIX B

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (29 USC 1001 *et seq*)

§ 1001. Congressional findings and declaration of policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans

before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

§ 1102. Establishment of plan

Named fiduciaries

(a) (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan

instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

Requisite features of plan

(b) Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

§ 1103. Establishment of trust

Benefit plan assets to be held in trust; authority of trustees

(a) Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan,

• • • •

§ 1104. Fiduciary duties

(a) (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

§ 1105. Liability for breach of co-fiduciary

Circumstances giving rise to liability

(a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Assets held by two or more trustees

(b)(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(c)(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104(a)(1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust

instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

Investment managers

(d)(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

§ 1106. Prohibited transactions

(a) Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

• • • •

(B) lending of money or other extension of credit between the plan and a party in interest;

• • • •

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

• • • •

§ 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall,

to the extent not inconsistent with the law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

(Pub.L. 93-406, Title I, § 515, as added Pub.L. 96-364, Title III, § 306(a), Sept. 26, 1980, 94 Stat. 1295.)

§ 1132. Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(b) (2) The Secretary shall not initiate an action to enforce section 1145 of this title.

• • • •

Jurisdiction

(e) (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, be-

neficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

§ 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

APPENDIX C

29 C.F.R. 2530.200b-2

§ 2530.200b-2 Hour of service.

(1) An hour of service is each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer during the applicable computation period.

Appendix D

LABOR DEPARTMENT ADVISORY OPINION LETTERS ON DELINQUENT CONTRIBUTIONS

August 31, 1976
Opinion 76-89
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(Re: 10 Civil Actions)

Dear Mr. Dower:

The Secretary of Labor has been served with copies of complaints filed on your behalf in the above-cited cases. While at the present time we do not propose to exercise our right to intervene in any of these cases pursuant to section 502 (h) of the Employee Retirement Income Security Act of 1974 (ERISA), we nonetheless wish to inform you of our views on two matters referred to in your complaints.

> Paragraph 11 of each of your complaints states:
> Unless the Pension Fund receives the contributions due it and can credit the same to the Defendant's employees, those employees will not be entitled to credit for hours worked which will result in their ineligibility for pension benefits upon retirement.

Without expressing any opinion on the law as it existed prior to the effective date of the Employee Retirement Income Security Act of 1974 (ERISA), I would advise you that in our opinion the substance of the position expressed in that paragraph is not lawful under ERISA. ERISA sections 202, 203, and 204, 29 U.S.C.A. §§1052, 1053 and 1054, set minimum participation, vesting and benefit accrual standards which are binding on all covered pension plans. All three sections provide that the satisfaction of their requirements be based solely on each participant's years of service. A "year of service" is defined as the completion of 1,000 hours of service within a designated 12-month period.

Appendix D

The definition of the term "hour of service" was specifically reserved for determination by the Secretary of Labor through appropriate regulations.

On September 8, 1975, a definition of the term "hour of service" was published in the *Federal Register*. Section 2530.200b-2(a)(1) states, "An hour of service is each hour for which an employee is directly or indirectly paid, or entitled to payment, by the employer for the performance of duties during the applicable computation period . . ." Although the Department of Labor will be making certain modifications in these regulations, none of the proposals under consideration would cause a change *in our present position that credit must be given solely on the basis of service performed for a participating employer, regardless whether that employer is required to contribute for such service or has made or defaulted on his required contributions. Any plan term or Trustees' resolution to the contrary is, in our judgment, unlawful and unenforceable.*

• • • •

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December 5, 1978

OPINION 78-28 A

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404(a)
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408(c)
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Harry A. Dower, Esq.
Dower, Yarema & Co., P.C.
First Valley Bank Building
Center Square
P.O. Box 950
Allentown, Pennsylvania 18105

Re: Central Pennsylvania Teamsters Pension Fund and Teamsters Local 429 Health and Welfare Fund

Dear Mr. Dower:

This is in response to your correspondence of April 18, 1977, May 24, 1977, and August 8, August 16, August 21,

August 31, and November 9, 1978, in which among other matters you request advisory opinions regarding the collection of delinquent employer contributions and the crediting of service in a pension benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA). In addition, you request an advisory opinion regarding the compensation of the trustees of the subject plans. You have supplied us with plan documents and other information. . . . . .

With respect to the first matters mentioned above, you request an opinion whether a multiemployer pension plan may provide that a participant shall accrue benefits only upon the payment of contributions by the employer required to make such contributions. You also request an opinion whether there is an extension of credit by a multiemployer plan to a party in interest where a contributing employer is delinquent in making its required contribution to the plan and the trust instrument provides that the trustees of the plan have no obligation to collect delinquent employer contributions. In connection with this request you also inquire whether the trustees, in the exercise of their discretion under the trust instrument, may adopt a policy not to sue for the collection of delinquent employer contributions.

With regard to the question of whether benefit accrual may be limited to hours for which contributions are received, sections 202, 203 and 204 of ERISA set forth the minimum standards for participation, vesting and benefit accrual. The Department is of the view that, at least for purposes of participation and vesting, credit may not be limited to service for which contributions are actually made. Where no distinction is made between credit for vesting and credit for accrual, all credit must be given solely on the basis of service performed for an employer sponsoring the plan, regardless whether that employer is required to con-

tribute for such service or has made or defaulted on his required contributions.[1] Accordingly, those provisions of the plan documents you submitted which limit employee entitlement by reference to the receipt of employer contributions are not, in our opinion, lawful under ERISA.

Concerning the collection of delinquent employer contributions, you argue that nothing in ERISA directly obligates plan trustees to collect such contributions. You further argue that it is only in connection with an extension of credit by a plan to a party in interest, prohibited under section 406(a)(1)(B) of ERISA, that the question arises. Your letter concludes that, in a multiemployer plan, where the terms of the plan state that no benefit credit will be given until a contribution is actually received by the plan even though a participant has performed the required hours of service, there is no extension of credit to a party in interest and therefore no prohibited transaction.

We do not agree with your argument that, because the plan does not become obligated to pay benefits with respect to particular service until the relevant contribution is received, failure to collect the contribution does not result in an extension of credit by the plan. This is because we do not agree with your premise that benefit credit can be withheld until the contribution is received. As stated above, it is the opinion of the Department that credit must be given on the basis of service, regardless of whether the employer is required to contribute for such service or has made or defaulted on required contributions.

Moreover, in Prohibited Transaction Exemption 76-1 (41 FR 12740, March 26, 1976), the Department stated that multiple employer plans which do not establish and implement reasonable, diligent and systematic collection procedures may be found to be engaging in prohibited transactions under sections 406 and 407(a) of ERISA. The Department also stated that arrangements, agreements or under-

standings whereby a multiple employer plan agrees to the late or delayed payment of employer contributions or payment of less than the full amount of a delinquent contribution, or writes off such a contribution as uncollectable, may also constitute prohibited transactions under those sections.

The collective bargaining agreement which you forwarded to this office requires, in Articles 49 and 50, that employers make contributions to the welfare plan and the pension plan, respectively. The plan trustees are in a position to enforce that duty on behalf of the two plans, and their failure to do so could, in our judgment, result in a violation of section 404(a) of ERISA. To the extent that section 404(a) imposes upon the trustees a duty to collect delinquent contributions, any provision in the plan instruments purporting to relieve the trustees of that duty, or of the power to carry it out, is void under section 410(a).

APPENDIX E

AFFIDAVIT OF DONALD J. WEYERICH, ESQ.

Comes now Donald J. Weyerich, an attorney licensed to practice law in the State of Missouri since 1967; enrolled in the Missouri Bar; admitted to practice in the United States District Court, Eastern District of Missouri, Eastern Division; and the Supreme Court of the United States and first being duly deposed on his oath, states:

On September 26, 1980, the Honorable John K. Regan, United States District Judge for the Eastern District of Missouri, Eastern Division, heard oral arguments as to Petitioner Prosser's Motion to Stay Discovery and Motion to Dismiss. During said oral argument, Judge Regan asked Respondents' counsel the number of cases that counsel had filed on behalf of Respondents in the United States District Court, Eastern District of Missouri, Eastern Division. Counsel replied that he did not know the exact figure, but he may have filed approximately eighty (80) cases. Counsel was under the impression that the Judge was inquiring as to how many cases counsel had filed in the United States District Court, Eastern District of Missouri, Eastern Division since his representation of Respondents, which began several years prior to 1980. At no time in said oral argument did counsel state that all the cases referred to involved alleged delinquent contributions and/or presented questions of interpretation of the underlying Collective Bargaining Agreements. Counsel merely stated an approximate number of cases that had been filed, and was not prepared to state the exact number of cases filed by counsel in the ten years he has represented the Respondent because the issue at bar was the narrow issue of arbitration and not how many cases were pending in the United States District Court, Eastern District of Missouri, Eastern Division at the time of oral argument.

Appendix E

Petitioners' statement that each of the cases presented questions of interpretation of underlying Collective Bargaining Agreements is erroneous. Counsel for Respondents has reviewed his Bi-Monthly Reports, billing records and files to provide a more accurate sampling of the issues in the cases pending as of September 26, 1980. As of September 26, 1980, the Respondent had thirty-six cases pending in the District Court which had been filed between 1977 and September 26, 1980. Twelve of the thirty-six cases, including Prosser and Schneider, presented questions of varying complexity in the interpretation of underlying Collective Bargaining Agreements. Seventeen of the remaining twenty-four pending cases had been settled by settlement agreement, default judgment or consent judgment and were subject to post judgment remedies.

Counsel did not and has not reviewed all cases filed since counsel has represented the Respondents, but if said cases were added to the aforementioned list, counsel is confident that the total number of filed cases would be approximately eighty cases.

(s) DONALD J. WEYERICH

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

Comes now Donald J. Weyerich, being of lawful age and after being duly sworn, states that he has read the foregoing Affidavit and that the facts therein are true and correct according to his best knowledge and belief.

(s) DONALD J. WEYERICH

Subscribed and sworn to before me the undersigned Notary Public, on this 5th day of January, 1984.

(s) BARBARA BENEFIELD
NOTARY PUBLIC

My Commission Expires:
November 18, 1987

[SEAL]

Office - Supreme Court, U.S.
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FEB 14 1984
ALEXANDER L. STEVAS
CLERK

Nos. 82-1860 and 82-1862

In The

Supreme Court of the United States

October Term, 1983

SCHNEIDER MOVING & STORAGE COMPANY,
Petitioner,

and

PROSSER'S MOVING AND STORAGE COMPANY,
Petitioner,

vs.

LORAN W. ROBBINS, et al., Trustees of the Central States, Southeast and Southwest Areas Pension Fund, a pension trust,
Respondents.

and

LORAN W. ROBBINS, et al., Trustees of the Central States, Southeast and Southwest Areas Welfare Fund, a health and welfare trust,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER SCHNEIDER MOVING AND STORAGE COMPANY

*David F. Yates
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Counsel for Petitioner Schneider Moving & Storage Company

**Counsel of Record*

February 14, 1984

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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Claude L. Kordus, Trustees Handbook: A Basic Text of Labor-Management Employee Benefit Plans (3d edition 1979) (Published by International Foundation of Employee Benefit Plans, Inc.) 6

Nos. 82-1860 and 82-1862

In The

Supreme Court of the United States

October Term, 1983

SCHNEIDER MOVING & STORAGE COMPANY,
Petitioner,

and

PROSSER'S MOVING AND STORAGE COMPANY,
Petitioner,

vs.

LORAN W. ROBBINS, et al., Trustees of the Central States, Southeast and Southwest Areas Pension Fund, a pension trust,
Respondents.

and

LORAN W. ROBBINS, et al., Trustees of the Central States, Southeast and Southwest Areas Welfare Fund, a health and welfare trust,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER SCHNEIDER MOVING AND STORAGE COMPANY

ARGUMENT

The Brief of the Respondent Trustees emphasizes the conflict which their position causes between the two important national policies which are involved in these cases. It creates a tension which is unintended by Congress and this Court and which will compound the prob-

lems which the statutory and body of federal common labor law as shaped by the courts were designed to resolve.

I. Determining the scope of Schneider's funding obligation is a function of the statutory collective bargaining process.

The Court below and the Trustees have confused the collective bargaining process provided for by Section 7 *et seq.* of the Labor Management Relations Act, 29 U.S.C. § 157 *et seq.* (1976), with the administration of Taft-Hartley Act multiemployer employee benefit funds under Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. 186(c)(5) (1976), and Sections 404(a) and 515 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1104(a) and 1145. These statutes involve separate and yet interrelated pieces of what should be a harmonious national labor and pension policy. The distinction is visually presented in the following Table I.

As Table I demonstrates, the focus of this particular dispute—determining the scope of Schneider's funding obligation—rests in the collective bargaining process and not with the administration of the respective funds.

To involve the Trustees in determining this issue would be to enmesh them in the collective bargaining process. This is precisely what Sections 302(c)(5) of the LRMA and Sections 404(a) and 515 of ERISA seek to avoid. Purely and simply, this case involves a dispute regarding the interpretation of the contract between Schneider and the union. They had agreed that such a dispute would be resolved through the process agreed upon in their collective bargaining agreement.

The Trustees and the Court below have also confused the distinction between determining Schneider's funding obligation under the terms of the collective bargaining agreement with the determination of entitlement to benefits under the plan documents. These are two separate and distinct functions.[1] Schneider and the union clearly intended that Schneider's funding obligation be set forth in the collective bargaining agreement and that its funding obligation be measured by the work performed by its "regular employees." Further, Schneider and the union clearly intended—or at least presumed—that the question of eligibility for benefits would be determined by the Trustees of the respective funds. The basis upon which the trustees make their determination of benefits and eligibility therefor is completely within their discretion, subject of course to acting prudently and reasonably. For example, there is nothing that would prevent the Trustees from making all casual and extra employees who have been employed in the moving industry for a given length of time, e.g., five years or more, eligible for certain types of benefits even though contributions have not been required on account of their work. Schneider concedes this. It just so happens that here the Trustees

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[1]As the Court recognized in *United Mineworkers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982), while the level of benefits and eligibility therefor are normally determined by the trustees of multiemployer plans, employers and unions can set the level of benefits and the eligibility therefor in their collective bargaining agreement and the trustees are bound thereby.

have, in the plan document, conditioned benefits on what the collective bargaining agreement requires.[2]

The Trustees express fear that the persons whose employment has been excluded from Schneider's funding obligation will make demands for pension and/or health and welfare benefits and that the Trustees will be required to provide those benefits. These are separate and distinct considerations which are unrelated to the issues in this case. Article III, *PARTICIPATION AND ELIGIBILITY FOR PENSION AND OTHER BENEFITS,* Section 1(b) of the Plan Document provides:

> An Employee shall become a Participant of this Plan, as amended effective January 1, 1976, upon completing a "Year of Employment", as hereinafter. defined, which ends after December 31, 1975, in which "Year of Employment", at least twenty weeks of contributions are made or are required to be made to the Pension Fund on his behalf.
>
> . . . .[3]

While there is logic in the belief that every dollar that is contributed to a health and welfare or pension fund because of an employee's work will eventually be returned to that employee in the form of benefits, as the Court is

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[2]The Plan Document is not set forth in any of the appendices, but was attached as Exhibit 5 to the Complaint filed against Schneider. It provides in ARTICLE III, PARTICIPATION AND ELIGIBILITY FOR PENSION AND OTHER BENEFITS, Section 2:

> Covered Employment. (a) Any employment of an Employee for which contributions to the Pension Fund are made or are required to be made on his behalf shall be considered Covered Employment.

[3]Exhibit 5 attached to Complaint against Schneider not included in Joint Appendix.

fully aware, that is definitely not the way these or similar employee benefit funds were intended to operate. The benefits provided and the eligibility for those benefits are determined by the Trustees primarily on the basis of actuarial considerations of what projected income and projected costs will be. The income and assets are primarily dependent upon the contributions made by employers. The total amount of these contributions and, therefore, the fund income is based not only on the rate negotiated in the collective bargaining agreement, but also on the level of employment which serves as the measure of the funding obligation. The funding obligation may also be measured by factors other than labor performed. For example, in *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72 (1982) the funding obligation was based on the number of tons of non-union coal which was purchased. The funding obligation can be based on many factors other than labor performed. It just so happens that it apparently made sense to Schneider and the union to measure the funding obligation by the labor performed by Schneider's regular employees and not by the labor performed by other types of employees, i.e., extras and casuals.

On the other hand, the Trustees determine, based on actuarial calculations, what the contributions, the accumulated assets, and the income therefrom will produce over a given period of time and then set a level of benefits and determine the eligibility requirements for those benefits. The actuaries base their predictions on numerous "actuarial assumptions." These amount to the actuaries' best guesses about investment earnings rates, death rates, participant termination rates, i.e., forfeitures of bene-

fits, disability retirement rates, early, normal, and late retirement rates, expense rates, number of hours, shifts, etc., worked, and census problems. The distinction between the negotiation of the funding obligation and the determination of the benefits and eligibility for benefits is well explained in Daniel F. McGinn, F.S.A., F.C.I.A., Actuarial Primer for Trustees (3d printing 1981) (published by International Foundation of Employee Benefit Plans, Inc.). Among other things, Mr. McGinn has served as a consultant and actuary for the Trustees involved in these cases. The court is respectfully referred to that basic text and in particular the discussion of the dependence of the Trustees on the funding obligation as negotiated in the collective bargaining agreement on pages 6 and 31-32. See also, Noel Arnold Levin, Guidelines for Fiduciaries of Taft-Hartley Trusts: An ERISA Manual (3d edition 1979) (published by International Foundation of Employee Benefit Plans, Inc.), in particular pages 121-134; Claude L. Kordus, Trustees Handbook: A Basic Text of Labor-Management Employee Benefit Plans (3d edition 1979) (published by International Foundation of Employee Benefit Plans, Inc.).

II. Efficiencies of size are irrelevant.

Both the Trustees in their brief and the amicus brief of the American Federation of Labor and Congress of Industrial Organizations argue that the funds involved are too big to be bothered by the resolution of coverage disputes under the terms of local collective bargaining agreements. This argument ignores the fact that the Trustees' own trust documents state that their right to

receive contributions from employers shall be made "as required by the applicable collective bargaining agreement between the parties." (J.A. p. 21) Further, what their argument amounts to is a contention that "bigger is better" and that there are economies of size if the Trustees can just be permitted to drag employers, regardless of their size—or lack of size—into federal court. Their argument ignores the fact that the very people who they claim they are attempting to protect are for the most part employed by small companies like Schneider and Prosser's. While the Trustees of these large funds may think nothing about filing suit in federal court, when an employer the size of Schneider is threatened with a federal suit, that single threat, by itself, can pose the very real likelihood that the owners and employees will incur substantial unexpected expenses, whether they pay the amount demanded (even though they be in disagreement) or whether they litigate the matter in federal court. Schneider did not bargain for the resolution of contract interpretation questions in federal court. It bargained for the resolution of such questions through a simple, expeditious, and inexpensive grievance and arbitration procedure.

III. The intent of Schneider and the Union was not to submit these disputes to Federal Court; the intent of the grantors of the trust is irrelevant to the resolution of the coverage issues.

Amicus AFL-CIO argues that the intent of the parties that created the funds was not to submit questions of trust administration to arbitration under a local collective bargaining agreement. That may very well be and

Schneider has no reason to contest the assertion. However, it is also totally irrelevant to the issue at hand. There is nothing in Section 302(c)(5) of the LMRA or Sections 404(a) or 515 of ERISA that requires or even permits the Trustees to impose their interpretation of the funding obligation on the local collective bargaining agreement. The intent of the parties that set up the trust funds in the first place is irrelevant to the issue of what Schneider's funding obligation is under its local collective bargaining agreement. This dispute does not involve questions of trust administration. It involves the scope of Schneider's funding obligation.

IV. Judicial efficiency and economy will best be served by requiring resolution of coverage issues through the agreed upon procedure.

Are the federal courts to become small claims courts? These cases were first filed as complaints in federal court in 1980. It is now 1984. Four years have passed since the commencement of these proceedings. A Federal District Court, a United States Court of Appeals, including a rehearing *en banc*, and now the Supreme Court of the United States have become involved in these two cases which should have been disposed of simply and expeditiously through the grievance and arbitration procedure of the collective bargaining agreements. Surely the involvement of the federal courts in relatively simple contract interpretation disputes will not serve justice. The collective bargaining agreement provides that a determination through the grievance and arbitration procedure shall be final and binding on the parties. Suffice it to say that had the coverage issue, which is now raised by the Trustees, been resolved against Schneider, Schneider would

have long ago been required to pay whatever was determined to be due. On the other hand, if the union had determined that it disagreed with the Trustees' position on the coverage issue and that it agreed with Schneider's position on the coverage issue, this matter likewise would have been resolved once and for all. Why should the Trustees be permitted to file time-consuming and expensive lawsuits in federal court when the issues they are raising have either been resolved or can be simply resolved between the union and the employer?

Chief Justice Burger in his 1983 year-end *Report on the Judiciary,* made special reference to the "Costs of Justice in America" and pointed out many of the advantages of arbitration over court litigation. While his comments related to the use of arbitration as an alternative to litigation, whereas here we are talking about utilization of the grievance and arbitration procedure as agreed upon by the union and Schneider as an alternative to the Trustees suing in federal court when coverage issues are involved, many of the arguments still apply. Arbitration is extremely swift and certain as compared to years spent as a case awaits trial in federal court. The decision under the collective bargaining agreements involved here would be final and binding. The costs of an arbitration are only a fraction of the costs involved in federal court litigation. The expertise of an arbitrator familiar with the law of the shop would be available. Strict rules of federal evidence do not apply. Such a resolution is what Schneider and the union bargained for.

Further, the National Labor Relations Board has recently reaffirmed its commitment to allowing issues which involve mixed questions of contract interpretation and

statutory rights under the Taft-Hartley Act to be resolved under contractually agreed upon grievance and arbitration procedures. *United Technologies Corporation,* 268 NLRB No. 83, 115 LRRM 1049 (Jan. 19, 1984). Further, at the same time the NLRB reaffirmed its policy announced in *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955) to defer to arbitration awards as an important aspect of the national labor policy favoring private resolution of labor disputes. *Olin Corp.,* 268 NLRB No. 86, 115 LRRM 1056 (Jan. 19, 1984). While Schneider obviously does not suggest that the Court is bound by rulings of the NLRB, the following should be noted. First, the NLRB is vested with jurisdiction to administer the Labor Management Relations Act because Congress determined that a special type of expertise was necessary to formulate a national labor policy. Secondly, the NLRB adjudicates statutory rights, not private contractual rights. Nevertheless, it believes that the statutory rights are best served if their resolution is deferred to the contractual grievance and arbitration procedure. Third, the NLRB, serving as a governmental agency with special expertise in the labor relations arena, has determined that the arbitration process is an important aspect of the national labor policy favoring private resolution of labor disputes and that this policy will be served by deferring to the arbitration process whenever possible. Last, this Court has approved the NLRB policy on deferring to arbitration both before and after the arbitration award has been issued. *Arnold Co. v. Carpenters,* 417 U.S. 12 (1974), 16-17.

Requiring that the Trustees defer to a resolution of the coverage issues by the union and Schneider in accordance with the agreed upon contractual arbitration pro-

cedures is consistent with the NLRB policy. As demonstrated by the facts in the Prosser case, precisely the same issue which the Trustees are attempting to litigate in federal court was in fact the subject of an unfair labor practice before the NLRB which the NLRB deferred to the arbitration process. To hold that the Trustees may circumvent that process by litigating the coverage issue directly in federal court creates a tension which is not consistent with the national labor policies.

V. Deferring coverage issues to arbitration will help avoid inconsistent results.

The Trustees have attempted to discount the likelihood of inconsistent results occurring if the same issues are resolved through the grievance and arbitration procedure between a union and an employer and also between trustees of a fund and an employer in federal court. However, this concern is not imaginary. Schneider respectfully requests the Court to take judicial notice of the case of *Central States, Southeast and Southwest Areas Pension Fund, et al., Plaintiffs, v. Rainbow Glass Co., Defendant;* Cause No. 83-1748-C(C) now pending in the United States District Court for the Eastern District of Missouri, Eastern Division. In that case, the same Trustees as the Respondents here have filed suit against Rainbow Glass Co. alleging, among other things, that Rainbow Glass had failed to make contributions due for a particular employee. This same employee had been considered to be a "temporary employee" by the employer, and therefore contributions were not made to the Trustees under the terms of the collective bargaining agreement. The

arbitrator found that the employee had attained the status of part-time and was therefore entitled to seniority rights under the contract. Further, the union and the employer did eventually agree in writing that contributions would be made to the Trustees on account of such person's employment, *commencing from and after May 1, 1982.* Nevertheless, in their lawsuit, the Trustees have chosen to ignore both the arbitration decision and the terms of the settlement between the employer and the union with respect to this emp'oyee and to seek contributions for time worked by this employee for the four years prior to May 1, 1982. In the *Rainbow Glass* case the Trustees have argued that they were never party to the arbitration and therefore are not bound by it. The Trustees therefore assert in *Rainbow Glass* that they have a right to litigate the status of the disputed employee. On February 7, 1984, the Honorable James H. Meredith, U.S. District Judge, denied Rainbow Glass' motion for summary judgment based on the arbitrator's decision, thus creating the very real likelihood of a conflicting result.[4]

Rainbow Glass has joined the union as a third party defendant in the case. Therefore, because of the Trustees' asserted right to resolve coverage issues in federal court, both Rainbow Glass and the union are now required to relitigate precisely the same factual issues that were litigated through the contractual grievance and arbitration procedure and the federal district court will apparently be required to hear and determine issues—which while not identical, are similar to those which were resolved by the

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[4]Judge Meredith's Order and Memorandum are included in the Appendix.

arbitrator. The Trustees claim they are not bound by either the judicially reviewed and approved arbitration decision or the written agreement.

CONCLUSION

For the foregoing reasons, and for the reasons stated in its brief on the merits, Schneider respectfully submits that the decision of the court below was erroneous and should be reversed and that the order of the district court dismissing the complaint should be affirmed.

Respectfully submitted,

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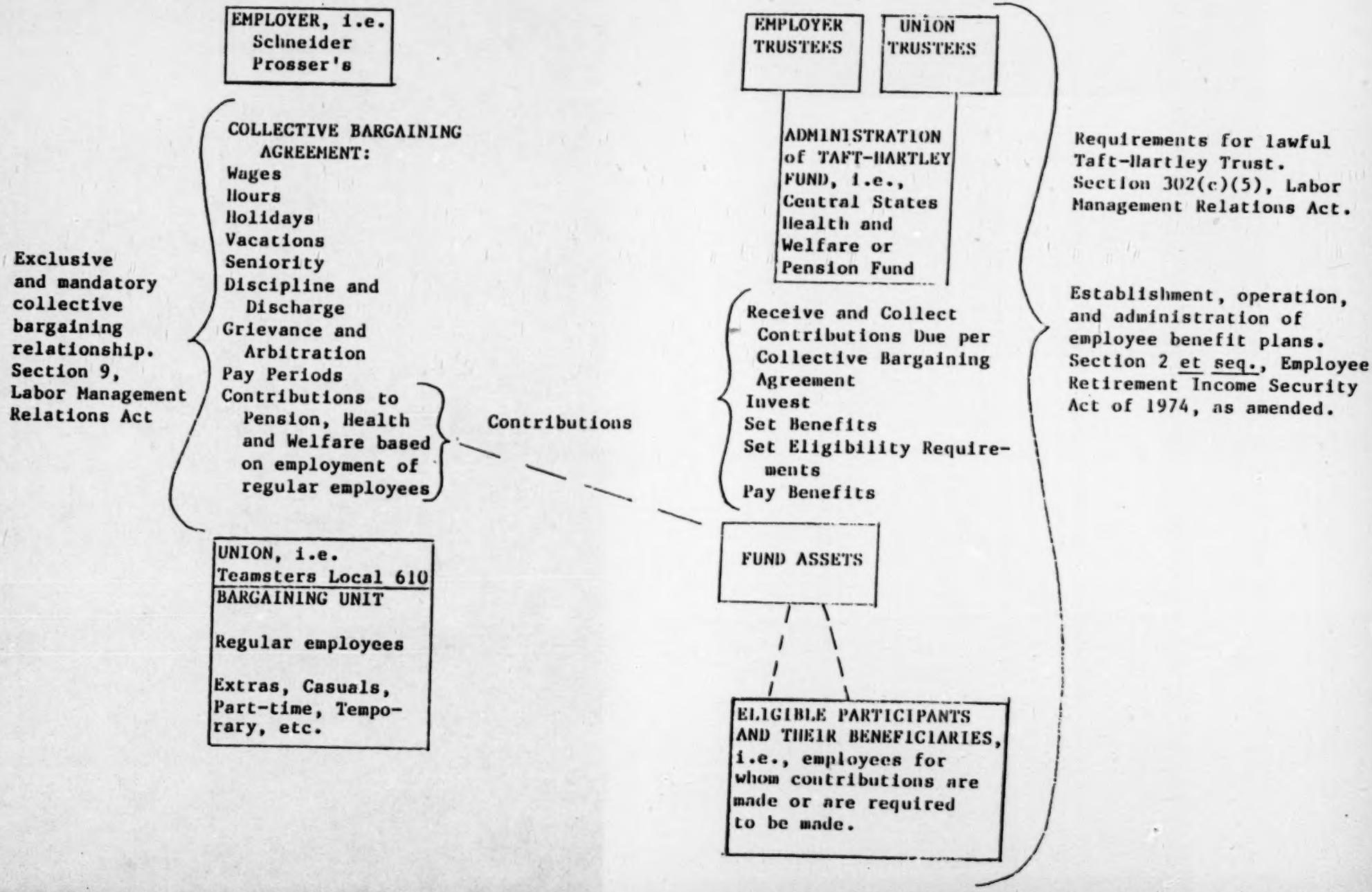
February 14, 1984

TABLE 1


EMPLOYER, i.e.
Schneider
Prosser's
COLLECTIVE BARGAINING AGREEMENT:
Wages
Hours
Holidays
Vacations
Seniority
Discipline and Discharge
Grievance and Arbitration
Pay Periods
Contributions to Pension, Health and Welfare based on employment of regular employees
Exclusive and mandatory collective bargaining relationship. Section 9, Labor Management Relations Act
UNION, i.e.
Teamsters Local 610
BARGAINING UNIT
Regular employees
Extras, Casuals, Part-time, Temporary, etc.
Contributions
EMPLOYER TRUSTEES
UNION TRUSTEES
ADMINISTRATION of TAFT-HARTLEY FUND, i.e., Central States Health and Welfare or Pension Fund
Receive and Collect Contributions Due per Collective Bargaining Agreement
Invest
Set Benefits
Set Eligibility Requirements
Pay Benefits
FUND ASSETS
ELIGIBLE PARTICIPANTS AND THEIR BENEFICIARIES, i.e., employees for whom contributions are made or are required to be made.
Requirements for lawful Taft-Hartley Trust. Section 302(c)(5), Labor Management Relations Act.
Establishment, operation, and administration of employee benefit plans. Section 2 et seq., Employee Retirement Income Security Act of 1974, as amended.

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1748-C(C)

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,

Plaintiffs,

vs.

RAINBOWGLASS CO.,

Defendant.

ORDER

(Filed February 7, 1984)

A memorandum dated this date is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that defendant's motion for judgment on the pleadings or, in the alternative, motion for summary judgment be and is hereby denied.

DATED this 7th day of February 1984.

/s/ J. H. Meredith
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1748-C(C)

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,

Plaintiffs,

vs.

RAINBOW GLASS CO.,

Defendant.

MEMORANDUM

(Filed February 7, 1984)

This matter is pending on defendant's motion for judgment on the pleadings or, in the alternative, motion for summary judgment for the reason the plaintiffs are collaterally estopped from recovering from defendant any fringe benefit contributions for Edward Copeland since it has already been judicially determined that Copeland was a "temporary employee." The motion will be denied for the reasons stated below.

On 22 July 1983, plaintiffs filed their complaint seeking unpaid contributions and interest due and owing the plaintiffs' Pension, and Health and Welfare Funds. Plaintiffs claim that the deliquency is due to defendant's failure to remit contributions to each fund on behalf of an employee of the defendant, Copeland. The dispute in this case is whether Copeland was a regular employee beginning in August 1978, obligating the defendant to remit contributions pursuant to the pertinent collective bargaining agreement between the defendant company and the local union, with plaintiffs as third party beneficiaries.

On 27 June 1980, an arbitration opinion and award was rendered with respect to a matter of private arbitration between Rainbow Glass Co. and Teamsters Local Union No. 610 regarding an alleged violation of section 7 of article VIII of the collective bargaining agreement pertaining to seniority. The arbitrator determined that the grievant, Copeland, was entitled to seniority status from 12 November 1979. The courts in *Rainbow Glass Company v. Local Union No. 610,* 505 F.Supp. 81 (E.D.Mo. 1980) and *Rainbow Glass Company v. Local Union No. 610,* 663 F.2d 814 (8th Cir. 1981), upheld the decision of the arbitrator. Plaintiffs did not participate in the arbitration award or the subsequent appeal.

Defendant's contention that, pursuant to the doctrine of collateral estoppel, plaintiffs' cause of action in this proceeding is barred by the arbitrator's findings is in error. The doctrine of collateral estoppel is not applicable in this action. Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation. *City of Saint Joseph v. Johnson,* 539 S.W.2d 784, 785 (Mo. App. 1976); *Ashe v. Swenson,* 397 U.S. 436, 442 (1970). In order to invoke collateral estoppel, there must be identity or privity of parties, mutuality, and a different claim, cause or demand in the second action. Moreover, some matter litigated in the former suit must be determinative of a matter in controversy in the second suit. *North Central Truck Lines, Inc. v. United States of America,* 381 F. Supp. 1217, 1220, (W.D.Mo. 1974).

In *Rainbow Glass,* the Court of Appeals found that the status of grievant's employment changed from a part-

time employee to a full-time employee, which entitled grievant to be placed on the seniority list. 663 F.2d at 818. The court did not decide whether Edward Copeland was a regular employee for purposes of defendant's obligation to contribute on his behalf to plaintiff's Pension, and Health and Welfare Funds. While recognizing that Copeland had been treated as a "temporary employee" for fringe benefit rights in the past, the court specifically noted the arbitrator's statement that "the fact that no fringe benefit contributions were made on behalf of grievant is immaterial. . . . The obligation to make such contributions was determined by different provisions of the collective bargaining agreement than the provisions giving rise to seniority rights." 663 F.2d at 816 n. 6. It is quite evident that the court in *Rainbow Glass* did not focus on the Pension, and Health and Welfare sections of the pertinent collective bargaining agreements in making their determination, but rather limited their attention to that of the employee's seniority rights and section 7 of article VIII of the collective bargaining agreement.

In the present action, the issue of ultimate fact to be decided is whether Mr. Copeland was, in fact, a regular, full-time employee for purposes of the articles of the collective bargaining agreement pertaining to health and welfare benefits and to pension benefits, not whether he was entitled to seniority status under a different article of the agreement. The precise issue must be litigated by the real parties in interest, plaintiffs (the pension trust, and the health and welfare trust) and Rainbow Glass. Plaintiffs will be afforded the opportunity to discover and

produce evidence with respect to this issue of fact. This issue was never properly determined or litigated in the arbitration matter dealing with Copeland's seniority status. Although the *Rainbow Glass* court mentions that the company was satisfied that Copeland was a temporary employee for purposes of fringe benefit contributions, the precise issue was never decided by a disposition on the merits.

Further, plaintiffs were not involved in any way in the former arbitration hearing. The arbitration matter was the result of a grievance filed by Copeland in order to determine his seniority status. Plaintiffs are seeking contributions under an entirely separate section of the collective bargaining agreement dealing with contributions to the Pension, and Health and Welfare Funds. There was no reason for the plaintiffs to intercede in the arbitration matter. Collateral estoppel dictates that to be bound by the court's judgment in a prior suit, a non-party must have sufficient interest in the suit (found when a party possesses a legal right, interest, or duty dependent wholly or in part on the cause of action before the court) and have participated in the litigation or been a privy of the prior party who did participate. *See Montana v. United States of America*, 440 U.S. 147, 153-54 (1979). Plaintiffs executed no control in the arbritration matter and had insufficient interest in the suit. Local Union No. 610 and plaintiffs are separate and distinct entities seeking to protect separate and distinct interests.

The doctrine of collateral estoppel is not applicable in this litigation due to the absence of two important elements: (1) identical parties in the prior litigation, or

parties in privity, and (2) an ultimate issue of fact in the prior judgment that is determinative of the ultimate issue in the present litigation.

DATED this 7th day of February 1984.

/s/ J. H. Meredith
United States District Judge

Office - Supreme Court, U.S.
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FEB 14 1984
ALEXANDER L. STEVAS
CLERK

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER PROSSER'S MOVING AND STORAGE COMPANY

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER PROSSER'S MOVING AND STORAGE COMPANY

ARGUMENT I

The Union And Prosser Intended To Reserve For Themselves The Right To Settle Disputes About The Meaning Of The Collective Bargaining Agreements By Use Of The Grievance And Arbitration Procedures Of The Contracts.

The Union and Prosser reserved the right to settle disputes about the meaning of the collective bargaining agreements by grievance and arbitration procedures. That this reservation applies to the dispute in this case was demonstrated in Prosser's brief in the following particulars:

(1) The clear and unequivocal language of the collective bargaining agreements (Prosser Brief at 18, J.A. 55);

(2) The comparably ambiguous language of the trust indentures (Prosser Brief at 20, J.A. 22);

(3) The conduct and bargaining history of the parties (Prosser Brief at 21, J.A. 99-108);

(4) The application of general contract law requiring trustees, as third party beneficiaries of the collective bargaining agreements, to be bound by the promise of the employer and union to arbitrate disputes[1] (Prosser Brief at 11-17);

(5) Laws which establish: (A) the duty and right of the union to act as the exclusive bargaining representative of employees; (B) a national labor policy favoring arbitration; and (C) a presumption that parties intend to settle disputes by arbitration. (Prosser Brief at 22-28);

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[1] "Where the contract contains an arbitration clause which is legally enforceable, the general view is that the beneficiary is bound thereby to the same extent that the promissee is bound. "*A Treatise on the Law of Contracts,* Williston, § 364A, at 877 (3rd Ed.1959).

(6) Federal pension and welfare laws which: (A) set the duties of fiduciaries of employee benefit trusts; and (B) establish the scope of fiduciaries rights to administer such trusts while in balance with the rights and duties of employee representatives to administer and enforce the terms of the collective bargaining agreement. (Prosser Brief at 28 - 47)

In response, *amici curiae* American Federation of Labor and Congress of Industrial Organizations (hereinafter, AFL-CIO) maintains that the trust agreements, not the collective bargaining agreements, are the documents which set forth the powers and duties of the Trustees, and that those agreements do "not condition or qualify the power of the Trustees to bring suit." (AFL-CIO Brief at 8)

This interpretation ignores the contractual scheme of the entire agreement bargained by the Union and Prosser, and accepted by the Trustees. The collective bargaining and trust agreements, when read together, separate the right to interpret the collective bargaining agreement from the right of the Trustees to institute suit to collect delinquent contributions. It must first be determined that contributions are "due and owing the fund" under the collective bargaining agreement before the Trustees are empowered to collect payments.

The AFL-CIO suggests that if the parties intended that interpretive disputes be processed through the contract arbitration procedure, then they, in all likelihood, would have provided the Trustees direct access to the arbitration process. (AFL-CIO Brief at 9) Whether the parties can authorize the Trustees to engage in such activity is questionable. In light of the general impropriety of trustees engaging in the settlement of grievances, *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), no presumption of intent can be drawn from the fact that the contracts do not

provide the Trustees an independent right to invoke the arbitration procedure.[2]

ARGUMENT II

The Union Has A Vital Interest In Enforcing The Contractual Rights Of Active Employees And Can Be Relied Upon To Exercise Its Statutory And Contractual Duty To Prosecute Meritorious Claims.

A. The Rights To Be Arbitrated Are Contractual

The Trustees contend that, because they are claiming *statutory* rights on behalf of participants in the Fund, arbitration of these statutory rights is inappropriate. The Trustees fail, however, to specify what statutory rights they seek to enforce.[3]

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[2] In *Central States Southeast and Southwest Area Funds v. Howard Martin*, 625 F.2d 171 (7th Cir.1980), the Trustees were unsuccessful in convincing the court that they should not be bound by the parties' agreement to arbitrate because they had no right to invoke the arbitration machinery of the contract. It is interesting to note that the 1982 National Freight Agreement, to which Howard Martin became a party was amended to expressly provide the Trustees with direct access to grievance procedures. (Trustees' Brief at 17, N 9.) By doing so, the parties evinced an intent both to arbitrate the disputes and to allay the Trustees' concern for domination and control by the union or employer.

[3] The Trustees appear to argue that because they have a statutory right to damages, attorney fees and penalties under § 502(g)(2) ERISA, 29 U.S.C. Sec. 1132(g)(2), arbitration is an inappropriate forum in which to settle the disputes raised by the Trustees. If this is the position of the Trustees, they beg the question. Whether the Trustees are entitled to relief under §502(g)(2) ERISA is dependent upon whether they have standing to sue under the provisions of § 515 of ERISA, 1980, 29 U.S.C. § 1145. Trustees' standing is dependent upon their contractual right to litigate the meaning of the contract with Prosser.

The Trustees rely upon the Court's reasoning in *Barrentine v. Arkansas-Best Freight Systems,* 450 U.S. 728 (1981) and *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974), to support this theory. Such reliance is misplaced. *Barrentine* and *Alexander* are not dispositive because "[t]he underlying dispute here does not involve substantive statutory rights, but rather, the Trustees' right to receive employer contributions. This right to contributions arises solely from the provisions of the collective bargaining agreements and not from those statutes dealing with the independence of Trustees or of the Fund." *Robbins v. Prosser,* Prosser Pet.Cert. at 36, dissent of J. Henley.

An individual employee has no separate or distinct statutory right to a pension or welfare benefit independent of the collective bargaining agreement. A benefit is only created or waived through the "majoritarian process" of collective bargaining. "[W]hen neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining contract." *United Mine Workers of America Health and Retirement Funds v. Robinson,* 455 U.S. 562, 576 (1982).

Questions of coverage for pension or welfare benefits under the collective bargaining agreements are typical labor disputes which are well suited for resolution by an arbitrator. That the union may represent competing interests in the collective bargaining unit is irrevelant to this case, for such is the nature of the union's representative role and responsibility. Congress specifically recognized that employee benefits are the end product of mandatory collective bargaining and, thus, dependent upon the good faith bargaining and fair representation of the union. See, *NLRB v. Amax Coal Co.,* 453 U.S. 322, 332 n.14 (1981).

B. The Union Has A Vital Interest In The Arbitration Of These Disputes

The Trustees argue that the Union cannot be relied upon to arbitrate contract disputes on behalf of the Funds because potential conflicts may exist between the Union's constituency and the Funds' participants and beneficiaries (in particular, retirees and their families). The Trustees suggest that the Union, because it does not represent retirees and their beneficiaries, does not have a compelling interest in the arbitration of the contract disputes raised by the Trustees in their petition. This argument is not supported by the facts of this case. The issues to be arbitrated in this case involve coverage and contributions on behalf of active employees.

Contribution to the fund is a part of the consideration Prosser has agreed to pay for the services of its "covered" employees. In the event that the Union believes that Prosser is failing to make full contributions on behalf of all covered (regular) employees, the Union's members will not have been paid in full for their labor in accordance with the collective bargaining agreement. *United States v. Carter*, 353 U.S. 210, 218 (1957).

Settlement of coverage questions and the payment of contributions are a primary and vital interest of the active employees and the Union. To assert otherwise is to ignore the fact that the Union has repeatedly bargained for such benefits. Whatever interest retirees and beneficiaries have in these disputes is at best secondary to the interest of the active workers, on whose behalf the contributions are made. Given the interest of active employees, the Union can be relied upon to arbitrate meritorious disputes posed by the Trustees.

The Trustees also maintain that because the disputes may effect non-union workers only, or due to the cost of arbitration, the union may lack incentive to arbitrate a meritorious dispute. Neither of the Trustees' hypotheses are supported by the record

in the Prosser case. All of Prosser's employees who are directly effected by the disputes are union members, and there is no evidence that the Union lacks resources to arbitrate the disputes.

The AFL-CIO takes the Trustees' arguments one step further. It argues that if the union in good faith disagrees with the merits of the trustees' dispute, that the trustees should be allowed to exercise their independent judgment and to press their interpretation to litigation with the employer. The AFL-CIO claims to see no problem with a court interpreting an agreement in a manner which conflicts with the construction adopted by the union and employer.

Such a result, however, would violate the intent of the parties, disrupt labor-management relations, require employer contributions not required by the collective bargaining agreement and allow a federal court to substitute its construction of the contract for that of the parties. *NLRB v. Amax Coal Co.*, 453 U.S. 332, 336 (1981); *United Mine Workers Of America Health And Retirement Funds v. Robinson*, 455 U.S. 562 (1982); *Carbon Fuel Company v. Mine Workers*, 444 U.S. 212, 218-219 (1979). This is precisely the reason that the Trustees should not be allowed to litigate before the Union and Prosser have an opportunity to settle on an interpretation of the agreement which will bind all parties.

ARGUMENT III

Allowing The Trustees To Litigate Collective Bargaining Disputes Creates A Substantial Risk That Trustees Will Compromise Their Strict Fiduciary Duties To The Fund Participants And Beneficiaries.

A rule disparaging arbitration and allowing trustees to litigate the meaning and intent of collective bargaining agreements directly with the employer cannot be justified on the basis of hypothetical and speculative threats to the independence of trustees. Such a drastic rule is neither required by the federal welfare and pension laws, nor by any decision of this Court. Aside from the effect it would have on the scheme of federal labor laws and labor management relations, the rule unnecessarily places trustees in a role which fundamentally conflicts with the duties of trust fund fiduciaries as dictated by Congress and defined by the Court.

If allowed to litigate these types of disputes, trustees will become embroiled in representing the partisan interest of the union, and, for all practical purposes, will be involved in an extension of collective bargaining. The neutral and independent role of trustees may, in fact, be sacrificed. See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336 and § 302(c)(5) LMRA 1947, as amended, 29 U.S.C. § 186(c)(5).

The trustees will be pressured by the practicalities of litigation to negotiate, compromise and settle disputes arising under the collective bargaining agreement. In all probability they will be forced to succumb to pressure and engage in compromise, which is wholly inconsistent with the duties of fiduciaries as mandated by § 1104. *NLRB v. Amax Coal, Id.* at 336.

It is the union's exclusive statutory and contractual duty to represent employees of the bargaining unit. § 9 NLRA, 29 U.S.C. § 159 (1976). The union, through its members, is to bear the costs of administering, enforcing and settling demands

through grievance and arbitration procedures. Permitting trustees to test the limits of a collective bargaining agreement will allow the union to sit back without financial or other risk and await a court's decision. If unsuccessful, benefit funds will incur the expense of litigation and possibly be ordered to pay the attorney fees and costs of the employers. § 502(a)(1) ERISA, 29 U.S.C. § 1132(a)(1).

The expenditure of fund assets to litigate the interests of employees who are judicially determined to be ineligible to benefit from the funds may expose the trustees to personal liability for incurring expenses not reasonably related to the administration of the funds § 404(a)(1)(A)(ii) ERISA, 1974, 29 U.S.C. § 1104(a)(1)(A)(ii)) or for engaging in a prohibited transaction by providing services or using funds for the benefit of a party in interest - the union. § 406(a)(1)(c)&(d) ERISA, 1974, 29 U.S.C. § 1106(a)(1)(c)&(d). Such a result is antithetical to the clear intent of Congress to insulate fund assets and fiduciaries from the interests of the union and the battles of collective bargaining. See, *NLRB v. Amax Coal Co., Id.* and Sec. 302(c)(5) LRMA.

There will be cases which will justify the trustees' litigation of labor-management disputes directly with the employer, but these will be the exception. Only by reaffirming the rule favoring arbitration, and thus giving effect to the clear intent of Congress, may the roles of the trustees and union be harmonized.

CONCLUSION

For the foregoing reasons, and for the reasons stated in its Brief on the Merits, Prosser respectfully submits that the decision of the Eighth Circuit was erroneous and should be reversed and that the order of the District Court dismissing the complaint should be affirmed.

Respectfully Submitted,

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Nos. 82-1860 and 82-1862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SCHNEIDER MOVING & STORAGE COMPANY,

and

PROSSER'S MOVING AND STORAGE COMPANY,
Petitioners,

v.

LORAN W. ROBBINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 95 national and international labor unions with a total membership of approximately 13,500,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in this Court's rules.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents in these cases are trustees of joint labor-management pension and health and welfare trusts; their "powers and duties" are set forth in the trust agreements

establishing these trusts. JA 14-33. Those agreements grant the trustees "the power to demand and collect the contributions of the Employers to the Fund" and to demand and be provided by the Employers such "information as the Trustees may reasonably require in connection with the administration of the Trust." JA 22-23. And, the trust agreements expressly empower the trustees to "institut[e] and prosecut[e] . . . and interven[e] in . . . any legal proceedings as the Trustees in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions or other amounts which may be owed to the Trust Fund." JA 22. The trust agreements do not condition in any respect this power of the trustees to bring suit, nor do the agreements subordinate the powers of the trustees to any powers of the unions or the employers that established the trusts.

The instant lawsuits were brought by the trustees pursuant to these express powers. Yet petitioners in these cases contend that the trustees may not bring such suits. Rather, say petitioners, because the duties owed by the employers here to the trust funds—duties which are stated twice, once in the applicable collective agreements and again in the trust agreements [1]—are defined by reference to provisions in the collective agreements, and turn upon the meaning of those provisions, the trustees are bound by the consensual grievance-arbitration process established by the union and employer in the collective agreements for resolving disputes between the employer and the union over the meaning of those agreements. Petitioners' argument reduces to the contention that the trustees, who have no independent access to those consensual processes, are dependent upon the union for enforcement of the employers' obligations to the trust.

We do not address in our argument whether the result urged by petitioners is permissible in the face of Congress'

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[1] JA 21 (trust agreements); JA 76, 77-78 (collective agreements).

insistence that benefit trust funds be administered by trustees who are not subordinate to either employer or union but rather are obliged single-mindedly to protect and advance the interests of the trust participants and beneficiaries. See *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981). For, in any event, that result would follow only if it were the result intended by the parties establishing the trust, or if it were the result required by law regardless of the parties' intent. And, as we show in our argument, the materials convincingly demonstrate that the parties here intended to empower the trustees to sue for collection and did not intend to make the trustees' ability to seek collection be dependent upon the union's willingness to invoke arbitration. We show further that, contrary to petitioners' contentions, neither the national labor policy nor third-party-beneficiary doctrine imposes upon the parties an obligation to arbitrate matters that the parties had decided not to submit to the arbitration process.

ARGUMENT

We assume—although the matter is not free from doubt—that consistent with § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5), and with ERISA, 29 U.S.C. §§ 1102-04, 1132(g)(2), 1145, employers and unions, in establishing pension and health and welfare trusts, *could* provide for the result urged here by petitioners: that, in a collection case turning on the meaning of a term in the collective agreement, the trustees cannot sue in court but must depend, so long as the union does not violate the duty of fair representation, on the union's willingness to take the case to arbitration. On that hypothesis, the first question to be asked in this case is whether *these* parties intended to condition in this manner the trustees' right to bring collection actions.

Petitioners contend that this question should be answered in the affirmative, invoking the presumption in favor of arbitrability enunciated by this Court in *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582-583

(1960): where a collective agreement contains a broad arbitration clause, arbitration of grievances involving the meaning and/or application of the agreement "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Again, so that we meet petitioners on their chosen ground, we assume that the national labor policy which prompted that presumption is operative here, although as we explain in the margin that is a debatable question.[2]

The proper starting point for evaluating petitioners' contention is that the presumption in favor of arbitration is *only* a presumption: "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf*, 363 U.S. at 582. National labor policy is effectuated "only if the means *chosen* by the parties for settlement" of disputes "is given full play." *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564,

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[2] This Court viewed the presumption in favor of arbitratability as necessary "to be consistent with congressional policy [expressed in § 203(d) of the LMRA, 29 U.S.C. § 173(d)] in favor of settlement of disputes *by the parties* through the machinery of arbitration." *Warrior & Gulf*, 363 U.S. at 582 (emphasis added). The "declaration of purpose and policy" that introduces § 203(d), contained in § 201(c), 29 U.S.C. § 171(c), explains:

> [C]ertain controversies which arise *between parties to collective bargaining agreements* may be avoided or minimized by . . . inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies. [Emphasis added.]

This Court has never held, or even suggested, that where a party to a dispute is neither the employer, an employee nor the union, there is a national labor policy that favors arbitration of that dispute simply because the dispute turns upon the interpretation of a provision in a collective agreement. See also *supra*, p. 3.

566 (emphasis added). The controlling principles are stated in *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 218-219 (1979):

> In the 1947 Taft Hartley Act [which added §§ 203 (d) and 301] Congress sought to promote numerous policies. One policy of particular importance—if not the overriding one—was the policy of free collective bargaining. . . . It follows that the parties' agreement primarily determines their relationship. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (though policy in favor of arbitration may color interpretation of contract, it cannot impose an agreement to arbitrate where the parties have agreed not to arbitrate). See *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring). If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution.

In the instant case, the parties "specifically resolve[d]" the issue of how the trustees were to enforce employer obligations to contribute to trust funds: the decision whether to pursue collection was committed to the trustees' discretion (and not subordinated to the union's willingness to invoke arbitration), with the means for pursuing collection to be a "legal proceeding" initiated by the trustees. Unlike in *Warrior & Gulf*, the parties here did *not* intend that the dispute be arbitrated.

1. In these cases, the trust agreements, not the collective agreements, are the documents which set forth the powers and duties of the trustees. The trust agreements, which establish and define the respective trusts, are not simply appendages of the collective agreements. To begin with, the parties to the trust agreements are different from the parties to the collective agreements. The parties to the collective agreements are simply the local union, Local 610 of the Teamsters, and the employer, petitioner Schneider Moving in one case and petitioner Prosser's Moving in the other. JA 51; Schneider Pet.

App. A-44. The parties to the trust agreements are: the Central and Southern Conferences of the Teamsters and their affiliated local unions; numerous employer associations on behalf of themselves and their members; numerous other unaffiliated employers; and the individual trustees "accepting the Trust obligations herein declared." JA 14-15. Each of the unions and each of the employers who is party to the trust has an interest in the trust being able to collect the appropriate amount of contributions from each of the employers involved. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 469 (1960). The mechanisms established in the trust agreement for collection of such contributions are the manifestation of those broad collective interests and not simply a reflection of the individual intentions of parties to a particular collective bargaining agreement.

In this context, it is not surprising that the trust agreements do not in any way subordinate the power of the trustees to protect the interests of the trust to determinations of particular local unions or particular employers. Rather, in meticulous detail the trust agreements invest the trustees with independent power to enforce the obligations of each involved employer to the trust. The trust agreements provide for the designation of trustees who shall "control and manage the operation and administration of the Trust[s]." JA 23. Those agreements declare that the trustees will "receive and hold the contributions and any other money or property which may come into their hands as Trustees . . . with the powers and duties, uses, and purposes" set forth in the trust agreements. JA 15-16. The trust agreements empower the trustees, *inter alia*, to "hold, manage, care for, and protect the Trust Fund and *collect* the income therefrom and *contributions thereto*, except to the extent that any of these functions or responsibilities are assigned to another entity or entities pursuant to any provision of this Article." JA 24, emphasis added. "This Article" is Article IV of the trust agreement, captioned "Powers and Duties of Trustees."

The trust agreements define the employers' obligations to the trusts and to the trustees as well. The agreements provide that "[e]ach Employer shall make continuing and prompt payments to the Trust Fund" in the amounts specified in the collective agreement entered into by that employer. JA 21; see *id.*, 15. And each employer must "promptly furnish to the Trustees, upon reasonable demand [such] information as the Trustees may reasonably require in connection with the administration of the Trust." JA 22-23. The trustees are also authorized to "examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust[s]." JA 23.

Of central importance here, the trust agreements expressly establish the trustees' right and obligation to enforce the employers' commitments to the trusts: "The Trustees . . . shall have the power to demand and collect the contributions of the Employers to the Fund." JA 22. And the trust agreements confer on the trustees the responsibility to take steps "to effectuate the collection or preservation of contributions," commit to the trustees' discretion the determination of what steps to take, and authorize the trustees to institute *any* legal proceeding that the trustees deem necessary to discharge this responsibility (JA 22) (emphasis added):

> Said Board of Trustees shall take such steps, including the *institution and prosecution of*, and intervention in, *any legal proceedings* as the *Trustees in their discretion deem in the best interest of the Fund* to effectuate the collection or preservation of contributions or other amounts which may be owed to the Trust Fund. . . .[3]

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[3] The trustees' authority to take action "to effectuate the collection or preservation of contributions" is "without prejudice . . . to the rights of the Union to take whatever steps which may be deemed necessary for such purpose." JA 22. This proviso makes clear that

This provision does not in any respect condition or qualify the power of the trustees to bring suit. Certainly, nothing in the trust agreements—the only documents that define the power and duties of the trustees—requires the trustees to submit claims against the employer to arbitration, either directly or by requesting the union to prosecute such claims.

2. It is doubtful that the parties to the collective agreements in these cases—the local union and each of the two petitioners here—could by their agreement negate the powers conferred upon the trustees by the broader group of employers and union that collectively constitute the parties to the trust agreements. But that question is not posed here, because the terms of the collective agreements in these cases do not purport to channel claims by the trustees into the grievance-arbitration process established by those agreements.

a. The collective agreements make provision for resolving "differences . . . between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of this agreement." JA 55; Schneider Pet. App. A-51. Only *such* "differences" are subject to the grievance-arbitration procedures established in the collective agreements, not differences between the trustees and the employer. Moreover, by the terms of the collective agreements, only "the Company or the Union" in the case of Prosser's Moving (JA 56) and only "the Union" in the case of Schneider Moving (Schneider Pet. App. A-52) may invoke arbitration. Cf. *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 243 (1962).

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the rights of the trustees established in the trust agreements are not in derogation of whatever rights the union may have under the collective agreements. If the employer has refused to contribute to the trust fund in violation of the collective agreement between the union and employer, the union retains the right under this proviso to pursue its own contractual remedies against the employer, should the union choose to do so.

Petitioners *concede* that the trustees are *not* empowered by the collective agreements to invoke arbitration themselves. Brief for Schneider Moving at 17-19; Brief for Prosser's Moving at 18. Thus, petitioners are driven to contending that the parties to the collective agreements intended that the union would act as the trustees' surrogate in the arbitration process—at least where the trustees' claim turns on the interpretation of a term of the collective agreement.[4] But there is not a word in the collective agreements to support that result. The parties to the collective agreements in these cases knew that the trustees were empowered by the trust agreements to bring collection cases. That being so, if these parties meant such cases to be processed through the contract arbitration procedure, they, in all likelihood, would have provided for that result explicitly. (Indeed, if that were their intention, they likely would have provided for direct access by the trustees to the arbitration process, rather than making the trustees dependent on the union's willingness to process trustee claims through arbitration.)

The fact that the collective agreements do not contain a word that supports petitioners' hypothesis requires rejection of their contention. It is one thing to presume that the parties intended the union to channel *its own* contractual disputes to arbitration. It is quite another to presume that, in the face of the trust agreements' investiture of the trustees with broad powers to act inde-

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[4] Petitioners try to confine their argument that claims by the trustees must be arbitrated only to a subset of collection claims—those in which there is a dispute over the meaning of the collective agreement. But *Warrior & Gulf's* presumption of arbitrability, on which petitioners rely, would, if applicable, not permit the line to be drawn at that point. As the collective agreement provides for arbitration of all disputes over the "meaning *or application*" of the agreement (JA 55, emphasis added), the logic of petitioners' contention would lead to the result that trustees could not pursue *any* collection claims in court, but instead would in *every* instance have to rely upon the union to process the collection claim through arbitration.

pendently of the employers and unions, the parties to the collective agreements meant (without anywhere saying so) to condition the trustees' ability to exercise those powers upon the union's acquiescence.

b. Petitioners deny that under their theory the trustees would be dependent upon the union. They argue that the parties intended that the union's duty of fair representation would provide the assurance that the trustees' meritorious claims would be pressed by the union to arbitration. But the union's duty of fair representation by its very nature could not provide any such assurance. Even if trustees could prosecute fair representation lawsuits against unions—and the source of their right to do so is nowhere explained by petitioners, who simply declare the existence of such a cause of action as an *ipse dixit*—the duty itself would not assure that all claims thought meritorious by the trustees would be pursued to arbitration.

First, the duty of fair representation is imposed on unions to compensate for "extinguish[ing] the individual employee's power to order his own relations with his employer" and "vest[ing in] unions [the] power to order the relations of employees with their employer." *NLRB* v. *Allis-Chalmers*, 388 U.S. 175, 180-181 (1967). The extent of the duty is therefore defined by the "scope" of the union's "authority . . . as exclusive bargaining agent." *Humphrey* v. *Moore*, 375 U.S. 335, 342 (1964). Thus, at the threshold, the duty would have no application in the context posed by petitioner's argument. The union is not the "agent"—much less the "exclusive" agent—of the trustees. The trustees are not members of the unit represented by the union, and indeed have independent representative duties of their own vis-a-vis the beneficiaries of the trust. *Amax Coal Co., supra.*[6]

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[6] Moreover, many of the beneficiaries of the trust are not represented by the union. The union, for example, does not represent retirees. "Retirees [can]not properly be joined with the active em-

Second, even if the duty applied, the union would remain free, consistent with its obligation fairly to represent bargaining unit members, to decline to take a claim to arbitration for a myriad of legitimate reasons unrelated to the merit of the claim. The union has "exclusive control over the manner and extent to which an individual grievance is presented." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 58, n. 19 (1974). See also *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). In performing that role, the primary objective is to further what the union deems to be the collective interests of the members of the bargaining unit. Even where an arbitrable claim is meritorious, a "union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration." *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728, 742 (1981). For "a union's objective is to maximize overall compensation of its members," and a union is therefore entitled to sacrifice particular elements of the compensation package "if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." *Id.* at 742. Further, as the court below observed, a union may consistent with its duty of fair representation determine not to press a grievance in order to avoid the cost of an arbitration proceeding, to maintain harmonious relations with the employer or to obtain concessions from the employer on other disputes. *Robbins* v. *Prosser's Moving & Storage Co.*, 700 F.2d 434, 442 (8th

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ployees in the unit that [a] Union represents," and "[s]ince retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer." *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157, 172, 181 n.20 (1971). Likewise, the union does not in most instances represent the persons who have been designated by employees as beneficiaries under the terms of the health and welfare plans. Thus, if a claim pertains to the interests of plan beneficiaries whom the union does not represent, the union would owe no duty of fair representation to either the trustees or the beneficiaries.

Cir. 1983). See also *Vaca* v. *Sipes*, 386 U.S. 171, 192 (1967); *Humphrey* v. *Moore*, 375 U.S. 335, 349 (1964).

Third, the union is entitled to make a good faith judgment, albeit a different judgment from that of the trustees, that a particular claim lacks merit and should not be pressed to arbitration for *that* reason. *Vaca* v. *Sipes*, *supra*, 386 U.S. at 191-193. If the union in good faith disagrees with the trustees as to the merit of a particular contention, the union would violate no duty by refusing for that reason to process the claim, even if a court might ultimately determine that the trustees' contention *is* meritorious.[6]

Thus, a union presented with a request by trustees to arbitrate a claim is not obliged to do so or face liability for breach of its duty of fair representation. And if, in

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[6] The *amici curiae* Merchants and Manufacturers Association and Rozay's Transfer maintain that requiring the trustees to request the union to arbitrate a claim is beneficial because it affords the union the opportunity to weed out frivolous trustees' claims. The *amici* hypothesize a case where the language of the collective agreement is ambiguous, "but the parties' statements during the negotiations clearly reflect [their] understanding." Merchant's Brief, at 16-17. "If . . . the decision below stands," the *amici* argue, "then the trustees in the hypothetical case would have no reason to pursue the matter with the union." *Id.*, at 17. But that argument—even apart from its subordination of the trustees to the union—assumes that the trustees would bring suit without making any investigation as to the underlying facts or as to the chances of the suit being successful. As a practical matter, the trustees *will* in all likelihood confer with the union and the employer in advance of bringing a suit, in order to determine whether evidence of the parties' intentions in fact exists. If such evidence establishes that the employer's interpretation is correct, the trustees would understand that to sue seeking a contrary interpretation would be futile: the evidence adduced at trial would result in judgment against them. Of course, in the typical case dispositive evidence of the parties' intentions will not exist. As we have shown, the trust agreements confer authority on the trustees in such circumstances to decide what, if any, action should be taken to serve the best interests of the fund; those agreements do not subordinate the trustees' judgment on the merits to that of the union.

the exercise of its permissible discretion, the union opts not to arbitrate the claim, under petitioners' proposal the trustees would be stymied in their efforts to "effectuate the collection or preservation of contributions or other amounts which may be owed the Trust Fund." JA 22.[7] In sum, it cannot seriously be contended that these parties *intended* to make the trustees dependent upon the union for enforcement of the employers' obligations to the trust funds.

4. Petitioners seek to avoid the result intended by the parties by suggesting that the opposite result is mandated by operation of law. They point to two purported sources of such a mandate, neither of which bears analysis.

a. Petitioners contend that the national labor policy in favor of arbitration requires that the trustees' claims be arbitrated, even if the parties intended otherwise. But as we showed earlier, this Court has squarely held that the "policy in favor of arbitration . . . cannot impose an agreement to arbitrate where the parties have agreed not to arbitrate." *Carbon Fuel* v. *Mine Workers*, 444 U.S. at 219; see p. 5, *supra*.

b. Petitioners contend that the result they urge is required because the trustees are third-party beneficiaries and thus are bound by whatever procedural requirements would confront the union if *it* sought to compel contribution. But if we are right that these parties did not *intend* the result urged by petitioners, petitioners cannot

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[7] Prosser Moving maintains that "[e]ven in the event the Trustees are unsuccessful in compelling the Union to prosecute these arbitral disputes, the Trustees shall have acted with due care, skill, prudence and diligence [and] could not be held liable for failing to fulfill their fiduciary duties." Prosser's Brief, at 37. The issue here, however, is not whether the procedure proposed by the employers will insulate the trustees from liability, but whether the trust documents subordinate the authority of the trustees to the union in this manner and thus take from the trustees the discretion to act in what *they* perceive to be the best interests of the fund beneficiaries and participants.

salvage their position by attempting to pin the label "third-party beneficiaries" upon the trustees. Even if the label were accurate,[8] the conclusion petitioners would draw—that the trustees are subject to the defense of failure to arbitrate that would be available were the union suing to compel collection—would not follow.

Third-party beneficiary doctrine is not a device to defeat the intent of the parties. Parties may "agree that the beneficiary will have an enforceable right despite any defenses which the promisor might have against the promisee." Calamari & Perillo, *Contracts* (2d Ed. 1977), § 17-8, at 624. See also, 4 Corbin on Contracts (1951), § 776 at 14, § 777 at 27; Restatement of Contracts, Second (1979), § 309, comment b. In the trust agreements here the parties have spelled out a role for the trustees that is different and independent from the role of the union. Indeed, such independence is the very reason for having pension and health and welfare funds administered by trustees. The parties in the trust agreements have expressly authorized the trustees to sue for contribution, and have not conditioned that authorization upon prior trustee success in persuading the union to resort to arbitration. These parties thus contemplated a procedure for trustee enforcement of contribution promises that would not afford employers a defense that the trustees had not resorted to arbitration. And that is dispositive, for, as the treatises cited above reflect, third-party beneficiary concepts are not intended to impose on

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[8] The commitments sued upon here are contained separately in the trust agreements and the collective bargaining agreements. The appropriate label to describe the trustees' role in suing on either the trust agreements or the collective agreements is by no means clear. The trustees have been established as an independent enforcement agency, not as incidental beneficiaries of the agreement. As this Court has recognized, the relationship of benefit fund trustees to a collective agreement "is not a typical third-party beneficiary" relationship. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 469 (1960).

contracting parties a result different from the result the parties intended.

CONCLUSION

For the reasons stated herein, the decision below should be affirmed.

Respectfully submitted,

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Nos. 82-1860 and 82-1862

IN THE

Supreme Court of the United States

October Term, 1982

PROSSER'S MOVING AND STORAGE COMPANY, a Missouri Corporation,

Petitioner,

and

SCHNEIDER MOVING AND STORAGE COMPANY,

Petitioner,

vs.

LORAN W. ROBBINS, *et al.*, TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS,

Respondents.

BRIEF OF AMICI CURIAE MERCHANTS AND MANUFACTURERS ASSOCIATION AND ROZAY'S TRANSFER IN SUPPORT OF PETITIONERS.

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Nos. 82-1860 and 82-1862

IN THE

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October Term, 1982

PROSSER'S MOVING AND STORAGE COMPANY, a Missouri Corporation,

Petitioner,

and

SCHNEIDER MOVING AND STORAGE COMPANY,

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vs.

LORAN W. ROBBINS, *et al.*, TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS,

Respondents.

BRIEF OF AMICI CURIAE MERCHANTS AND MANUFACTURERS ASSOCIATION AND ROZAY'S TRANSFER IN SUPPORT OF PETITIONERS.

Statement of Interest of Amici Curiae.

The Merchants and Manufacturers Association (the "Association") is a non-profit California corporation whose purpose is to augment the human resources management of member firms. Over 2,600 companies of varying sizes and in diverse industries are members of the Association. These members collectively employ over one million employees in the State of California.

Many of the Association's members are parties to collective bargaining agreements which provide that the members will contribute to a multiemployer pension trust fund on behalf of specified employees. These collective bargaining agreements typically provide that any disputes over the interpretation of a term of the agreements will be submitted to final and binding arbitration.

The Association's members who are parties to such agreements strongly oppose any erosion of the important federal policy requiring that a binding arbitration provision in a collective bargaining agreement must be utilized. These members believe that only a labor arbitrator is capable of correctly resolving a dispute over the meaning of the pension provision of a collective bargaining agreement.

Rozay's Transfer is a California employer engaged in the trucking industry. It is presently a defendant in two separate lawsuits with the Southwest Administrators of the Western Conference of Teamsters Pension Trust Fund. Each case concerns a claim for allegedly delinquent contributions to the Pension Trust.

Pension contributions are paid to the Pension Trust in accordance with the collective bargaining agreement between Rozay's Transfer and Local Freight Drivers Union, Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The agreement provides that any disputes arising under it will be determined according to the agreement's grievance and arbitration provisions. Nevertheless, in each instance, the Trust filed its lawsuit without exhausting the grievance procedure. In the first dispute, the Trust demanded pension contributions on behalf of "casual employees." In the second dispute, the Trust demanded contributions for several months during which Rozay's Transfer had no duty to contribute. Each lawsuit depends upon the interpretation of the terms

of the collective bargaining agreement.

Rozay's Transfer maintains that these issues should be submitted to arbitration for two reasons: first, an arbitrator is in a better position than a court to interpret the agreement in accordance with the "law of the shop" in the trucking industry; and second, Rozay's Transfer bargained for the resolution of collective bargaining disputes by arbitration, and it is entitled to the benefit of its bargain.

Rozay's Transfer and the Association have an interest in the cases now pending before the Court because in these cases the Court will decide whether, in a dispute over the meaning of a pension provision set forth in a collective bargaining agreement, pension fund trustees must utilize the grievance and arbitration procedures set forth in the agreement. The Court's holding will have a direct impact on the two lawsuits now pending in which Rozay's Transfer is a defendant, and on future disputes between members of the Association and their unions.

Consent of Parties.

The Petitioners in Nos. 82-1860 and 82-1862, and the Respondent in both cases, have consented in writing to the filing of this brief by amici curiae. The parties' written consent will be filed with the Clerk of the Court concurrently herewith.

Summary of Argument.

When a collective bargaining agreement contains an arbitration clause, federal labor policy requires disputes over the meaning of a term in the agreement to be submitted to arbitration. The labor arbitrator is familiar with what this Court has called the "industrial common law," and is therefore in a better position to interpret the agreement than is a court.

There is no reason why this important federal policy should not be applied to the pension article of a collective bargaining agreement in the same way that it is applied to every other provision of the agreement. Disputes over the pension article will commonly be of two types: disputes over *who* is covered by the provision, and disputes over *how much* of a contribution must be paid. Both types of disputes require interpretation of terms of art such as "regular employee" or "straight-time pay." Arbitrators are in the best position to interpret such terms in light of the industrial common law.

This Court's decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) provide no support for the decision below. In those cases the Court held that because an arbitrator had no expertise in interpreting federal statutes, arbitration decisions were not binding on the question of whether an employer violated federal equal employment law or minimum wage law. In the instant cases, by contrast, if the disputes were submitted to arbitration the arbitrator would not be asked to interpret a federal statute, but would be asked what the collective bargaining agreement means.

The court below explained that its decision was necessitated by what it called "federal pension policy." The court offered no explanation why initially submitting disputes to arbitration would in any way be contrary to federal pension policy. The court below expressed fears that a union might wrongfully refuse to process a grievance over pension contributions. This fear is unfounded: if the union fails to act, the trustees can then sue for the contributions in federal court. Moreover, this Court's recent decision in *Bowen v. United States Postal Service*, ___ U.S. ___, 103 S. Ct. 588 (1983), subjects the *union* to damages if it breaches its duty

of fair representation, and insures that the union will not arbitrarily fail to process legitimate claims.

Finally, the union must be permitted to review a claim to see if it has merit *before* litigation is commenced. The union is in the best position to evaluate the merits of a potential claim, because the *union*, not the trustees, negotiated the agreement and knows what benefits it won from the employer, and what benefits it did not. The union must have an opportunity to refuse to process claims which it knows to be meritless before the trustees take meritless claims to court.

ARGUMENT.

I.

Pension Contribution Cases Involve Disputes Over the Interpretation of the Terms of a Collective Bargaining Agreement.

Contributions to a pension trust fund are fringe benefits often sought by unions in collective bargaining. From the union's point of view, obtaining an employer's agreement to contribute to a multiemployer pension trust is a major bargaining goal. These trust contributions, governed by § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), are especially valuable to employees in industries such as the trucking industry because employees frequently change employers.

For many employers, especially small employers, pension contributions to a multiemployer § 302(c)(5) trust were at one time less expensive than establishing their own pension programs. The advent of multiemployer pension plan withdrawal liability has significantly reduced this incentive. From the employer's point of view, participation in the multiemployer pension trust is only feasible if the employer can determine in advance what the cost will be. In negotiating with its union, therefore, the employer will attempt to specify clearly which employees will be covered and how much of a contribution will be made for them. During negotiations, the pension plan administrators play no role at all; the agreement is reached solely between the employer and the union.

While the parties will try to be as clear as they can in the pension article of the agreement, disputes will inevitably arise over its meaning. These disputes will generally be of two types: (1) *who* is covered by the pension article; and (2) *how much* of a contribution is required. The resolution

of each type of dispute will turn on an interpretation of the agreement itself, in light of the negotiating history and the practice in the industry.

The instant cases now before the Court are good examples of the first type of dispute. The collective bargaining agreements provide for contributions to be made on behalf of "regular employees." The employer and the pension trustees in each case have a dispute over who is included in that term.

Amicus curiae Rozay's Transfer is presently involved in a similar dispute with a pension trust.* The question in that case is whether pension contributions are required to be made on behalf of "casual employees," as that term is used in the collective bargaining agreement. In order to resolve the dispute, the decision-maker must determine what the parties meant when they used the term "casual employees" in their agreement.

A second type of dispute which may arise concerns the *amount* of pension contributions to be made on which types of compensation. For example, the pension provision of a collective bargaining agreement may provide that the contribution will be a specified percentage of the employee's "wages" or of the employee's "straight-time" pay. Disputes can easily arise as to the meaning of these terms. Does the term "wages" include bonuses, shift differentials, call-in pay or standby pay? Does the term "straight-time pay" include double pay for Sundays, if Sundays are a regularly scheduled workday, or meal payments, or overtime penalty provisions such as "golden time"? As in the case of determining who is covered, these disputes will depend on the

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*Rozay's Transfer asks this Court to take judicial notice of this action. Copies of the complaint and answer are on file in the Los Angeles County Superior Court, Case No. C 291662.

meaning of the terms used in the collective bargaining agreement.

An excellent illustration of this second type of dispute is the decision of Arbitrator Drotning in *American Ship Building Co. and International Brotherhood of Boilermakers, etc., Local 358*, 75 L.A. 1252 (Drotning 1980). For the Court's convenience, a copy of this decision is attached hereto as Appendix A. In *American Ship Building*, the collective bargaining agreement contained a provision requiring that pension contributions be made: "on the basis of twenty-five cents ($.25) per hour for all actual hours worked and/or paid for all employees covered by this Agreement." A dispute arose over whether overtime hours at double pay should trigger pension contributions of $.25 per hour (based on actual hours worked) or $.50 per hour (based on hours paid).

A second dispute arose over whether pension contributions must be made for employees on funeral leave. The employer conceded that contributions must be made for paid holidays and vacations, but maintained that no contributions were due for employees on paid funeral leave. The employer argued that because funeral leave was unexpected paid time off, and therefore did not appear in the employer's calculations of the cost of the pension program, no contributions were due for such time.

In order to resolve the two disputes, the arbitrator took testimony regarding bargaining history, and applied the "law of the shop" to the contract. In determining the overtime hours dispute, the arbitrator ruled for the employer because "the phrase, 'actual hours worked and/or paid' is superfluous and confusing if it really means hours paid." 75 L.A. at 1254. In resolving the funeral pay dispute, the arbitrator applied his knowledge of the collective bargaining process. He held that funeral leave was no different from holiday or

vacation paid time off, explaining: "it makes no practical sense to think that the Union would demand the inclusion of holiday and vacation pay and leave out funeral pay." The arbitrator therefore held that pension contributions must be made for each hour of paid funeral leave. This case is a classic example of how a labor arbitrator interprets an ambiguous provision of a collective bargaining agreement by applying his own common sense and the "law of the shop."

II.

Judges and Juries Are Not Competent to Decide Disputes Over the Meaning of the Pension Article of a Collective Bargaining Agreement.

This Court decided over 20 years ago that disputes over the meaning of a collective bargaining agreement are to be resolved by labor arbitrators, not by the courts. The Court explained that the interpretation of a collective bargaining agreement demands knowledge of "the industrial common law — the practices of the industry and the shop . . ." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). Such knowledge is beyond the ken of most judges and all juries.

As the Court explained in *Steelworkers, supra*, arbitration is preferred over judicial litigation to resolve such disputes. In the Court's words:

> "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts." 363 U.S. at 581.

The Court went on to note that the labor arbitrator is selected by the parties because of their confidence "in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment." 363 U.S. at 582.

These principles certainly apply to disputes over the meaning of a pension article in a collective bargaining agreement. Labor arbitrators are in a far better position than judges or juries to interpret such terms of art as "regular employees," "casual employees" or "straight-time pay." As evidenced by Arbitrator Drotning's decision in *American Ship Building, supra,* 75 L.A. 1252, labor arbitrators with experience in a given industry, who are well-versed in the industrial common law of that industry, can interpret ambiguous contractual terms in light of the "law of the shop." They will also be able to evaluate testimony over bargaining history to determine what the parties intended by a specified term. It is for these reasons that Congress declared that arbitration is "the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement . . ." 29 U.S.C. §173(d).

If the decision below stands, this policy will be severely undercut. Judges or juries will interpret such terms of art as "casual employees" or "straight-time pay" instead of arbitrators. The court below offered no reason why courts would be in a better position than arbitrators to interpret such terms. In fact, no such reason exists. These terms are no different from any other terms in a collective bargaining agreement, which are to be interpreted by arbitrators, not courts.

III.

The Court Below Erred by Relying on This Court's Decisions in *Barrentine v. Arkansas-Best Freight System* and *Alexander v. Gardner-Denver.*

The court below attempted to justify its departure from 20 years of established labor law by relying on a principle established by this Court in two cases, *Alexander v.*

Gardner-Denver, 415 U.S. 36 (1974), and *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981). In *Alexander v. Gardner-Denver*, the Court held that because a labor arbitrator had no expertise in interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, his decision that an employer had not violated the nondiscrimination clause of a collective bargaining agreement would not mean that the employer had not violated Title VII. Similarly, in *Barrentine*, the Court held that an arbitrator's decision that the company did not violate the collective bargaining agreement by refusing to compensate its drivers for time spent inspecting their trucks would not preclude a private action for unpaid wages under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*

In the instant cases, by contrast, if the disputes were submitted to arbitration, the arbitrator would not be called upon to interpret the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, or any other federal or state law. The arbitrator would be asked to interpret the collective bargaining agreement. Specifically, the arbitrator would be asked what the parties meant when they used the term "regular employees" in their agreement. In determining such questions it is the courts and not the arbitrators who lack expertise. The interpretation of contractual terms such as "casual employee" or "straight-time pay" are better left to arbitrators.

IV.

The Employer Who Bargained for an Arbitrator's Determination of Disputes Is Entitled to the Benefit of Its Bargain.

The decision of the court below deprived the employers of the benefit of their bargains. The employers bargained for a provision in the contract under which disputes over

its meaning would be resolved by arbitration. The decision below deprives the employers of the benefit of this bargain by requiring disputes over the meaning of the pension article to be litigated in a court.

An employer may have several reasons for seeking an arbitration provision. First, arbitration is a quick method of resolving disputes. An arbitration will commonly be scheduled within months of a dispute arising. A court action, by contrast, may take years. For example, amicus curiae Rozay's Transfer is a defendant in a court action over pension contributions which was filed in July 1979. The case is still pending.* The employer would have a particular reason for seeking a quick resolution of a dispute over pension contributions, because such a dispute would involve present and future contributions, as well as past contributions. For example, suppose an employer and the trustees had a dispute over whether contributions must be made on behalf of casual employees. In many courts, the dispute could sit for years waiting for a trial date. While the parties wait for a trial date, the employer would continue to withhold contributions for the disputed classification. After several years of waiting, the employer could be faced with a huge judgment, including very high penalty and interest provisions.

Second, as noted earlier, the employer has selected arbitration as the means for resolving disputes because of its confidence in the arbitrator's knowledge. In this Court's words:

> "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed

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*In Los Angeles County Superior Court a 4-5 year wait from the filing of the complaint until trial is the norm.

in the contract as criteria for judgment." *United Steelworkers of America, supra*, 363 U.S. at 582.

The decision below deprives an employer of this benefit. Instead of the knowledgable arbitrator for which it bargained, the employer is forced to litigate before a judge or jury wholly unfamiliar with the industrial common law. Additionally, the employer and union run the risk that crucial evidence might be excluded because of technical rules of evidence not applied in arbitration.

Third, an employer may have sought arbitration because it is a far cheaper method of resolving disputes. It generally does not include expensive discovery, such as interrogatories or depositions. The actual arbitration will probably be shorter, and therefore less expensive, than a court trial. There is only limited judicial review of an arbitration award, and therefore little chance of additional expenses on appeal.

Finally, the employer seeks arbitration to avoid the risk of conflicting interpretations. The court might define the term "regular employee" one way for pension purposes while an arbitrator might construe the same term differently for purposes of the seniority or overtime articles. Such conflicting interpretations would create havoc in the day-to-day application of the collective bargaining agreement.

For one or more of these reasons, most employers bargain for an arbitral determination of contract disputes. The decision below deprives employers of the benefit of that bargain. The court offers no justification for doing so; as noted above, it offers no reason why courts are any more qualified to interpret the meaning of the pension article of a collective bargaining agreement than they are to interpret any other article. In the absence of any such reason, the federal policy should be maintained, and the employers should be granted the benefit of their bargains.

V.

Federal Pension Policy Is Not Inconsistent With the Requirement That Disputes Over the Meaning of a Collective Bargaining Agreement Be Submitted to Arbitration.

The court below acknowledged the important federal policy of requiring disputes over the meaning of a collective bargaining agreement to be submitted to arbitration. Nevertheless, the court held that this policy was subordinate to what it viewed as the national pension policy. The court cited several decisions by this Court which it said established such a national pension policy. Interestingly, the court below stated that these cases did not compel its holding, only that they are "suggestive enough to raise serious questions" about earlier Eighth Circuit decisions which required arbitration.

The rationale offered by the court below is wholly unpersuasive. Nothing in federal pension policy requires that a court and not a labor arbitrator should construe the meaning of a term in a collective bargaining agreement. The court cites this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), and its description of the legislative history of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1132 *et seq*. According to the legislative history, by these Amendments Congress intended to eliminate "costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to the contributions." 455 U.S. at 87 (Emphasis in original.) This legislative purpose supposedly calls for dispute-resolution in a court instead of before an arbitrator.

The court's reasoning is confusing to say the least. Arbitration is the antithesis of "costly and complex litigation."

Yet the court seems to be saying that because Congress sought to eliminate complex and costly litigation, disputes must be resolved in court instead of before an arbitrator! Surely, the opposite should be true: Congress' intention to abolish costly and complex litigation would indicate that arbitration is the favored remedy.

Moreover, the Court stated that Congress sought to eliminate litigation "over claims and defenses *unrelated* to the employer's promise . . ." In the instant cases, the disputes are directly related to the employer's promise: specifically, the question in each case is what was meant by the employer's promise to make pension contributions. There is no indication that Congress intended to preclude an employer from litigating such a dispute before an arbitrator.

VI.

It Is Unlikely That a Union Will Refuse to Process Legitimate Claims in Light of This Court's Decisions in *Vaca v. Sipes* and *Bowen v. United States Postal Service*.

The court below was very concerned that if trustees were required to ask the union to arbitrate, the union might refuse, for improper reasons such as favoritism. The court below apparently believed that if the trustees asked the union to arbitrate and the union refused, the contributions would be lost forever. This is simply untrue. Clearly, if the union were to do so, it would breach its duty of fair representation, and the trustees could then initiate a lawsuit against the union for its breach of the duty of fair representation.

The court below made no mention of the fact that a party aggrieved by a union's breach of the duty of fair representation has a remedy: a lawsuit brought under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. In *Vaca v. Sipes*, 386 U.S. 171 (1967) the Court held that an

employee wrongfully discharged could sue the employer and his union if the union breached its duty to him by failing to pursue his grievance. The Court explained:

> "To leave the employee remediless in such circumstances would, in our opinion, be a great injustice." 386 U.S. at 186.

By the same token, the trustees would not be remediless if the union wrongfully refused to process a claim for unpaid pension contributions. Like the employee in *Vaca*, they could sue in federal court.

More recently, this Court has held that when a union breaches its duty to the employee by failing to pursue a grievance, the union can be responsible for a proportionate share of the employee's damages. *Bowen v. United States Postal Service*, ___ U.S. ___, 103 S.Ct. 588, 74 L. Ed. 2d 402 (1983). The *Bowen* case provides an additional guarantee that a union will not arbitrarily refuse to process a legitimate claim for unpaid pension contributions: under *Bowen*, the union could be required to pay a share of those contributions if its refusal to pursue the grievance constituted a breach of the duty of fair representation. For this reason, the court below's fear that unions will capriciously refuse to process legitimate claims is unwarranted.

VII.

The Union Should Be Given an Opportunity to Decline to Process Meritless Claims.

The decision below ignores the fact that a union might have a very legitimate reason for declining to take a case to arbitration: the union might know that the claim is meritless. For example, suppose the union and the employer agree during negotiations that no pension contributions will be made for part-time employees. The written collective bargaining agreement is ambiguous on this point, but the

parties' statements during the negotiations clearly reflect this understanding. Suppose further that the pension trust, after conducting an audit and discovering that no pension contributions have been made for part-time employees, wishes to collect what in its view are delinquent contributions. If the trustees are required to pursue arbitration through the union, the union will presumably inform them that no contributions are due for part-time employees, and that it will not pursue the grievance. The matter will, quite properly, end there. It is the *union*, after all, and not the trustees, who bargained with the employer. They know which benefits they won for the employees, and which benefits they did not.

If, however, the decision below stands, then the trustees in the hypothetical case would have no reason to pursue the matter with the union. They would go straight to court and file an action seeking contributions for part-time employees, in spite of the fact that there is no contractual right to such contributions. The employer, of course, would defend the action by arguing that the union agreed that no contributions would be made for part-time employees, but it is unlikely that the employer would win a motion to dismiss or a motion for summary judgment on this issue. Instead, the employer and the trustees would engage in the kind of "costly and complex litigation" which Congress sought to avoid when it amended ERISA in 1980. *Mullins, supra*, 455 U.S. at 87.

Conclusion.

For all the foregoing reasons, it is respectfully submitted that the decision below should be reversed, and this Court should hold that a claim for unpaid pension contributions

which requires interpretation of a collective bargaining agreement must be determined according to the grievance and arbitration provisions of the agreement.

DATED: November 17, 1983.

Respectfully submitted,

STEPHEN P. PEPE,

Counsel of Record for Amici Curiae Merchants and Manufacturers Association and Rozay's Transfer.

Of Counsel:

O'MELVENY & MYERS,

JOEL M. GROSSMAN.

APPENDIX A.

AMERICAN SHIP BUILDING CO. — Decision of Arbitrator

In re AMERICAN SHIP BUILDING COMPANY, AMSHIP DIVISION, LORAIN YARD and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 358, FMCS Case No. 80K/20357, December 3, 1980

Arbitrator: John E. Drotning, selected by parties through procedures of Federal Mediation & Conciliation Service

DROTNING, Arbitrator. — The parties jointly submitted the following issue:

> Is the Company violating articles 9 and 34 of the Agreement by not making pension contributions on actual hours worked and/or paid?

Testimony of the Parties

(a) *Union*: Mr. Thomas Cooper testified he had been involved in the negotiations leading up to the present Agreement and that he and Mr. Sepelak chaired these sessions. He went on to say that the Union submitted a proposal on pension contributions. This was subsequently revised, said Cooper, and this revision contains the best possible language and it means that contributions on actual hours worked and/or paid. Mr. Cooper asserted that if an employee worked 8 hours at double time, the pension contribution of $.25/hour should be multiplied by 16 hours. This intent, continued Cooper, was clearly stated in the negotiations and well understood by both sides.

Mr. Cooper testified that the Company countered the Union's proposal by submitting language which stated hourly pension contributions were for "all straight time hours".

The Company's proposal, continued Cooper, was not incorporated into the Agreement and the idea of straight time hours was never discussed at the table. Mr. Cooper went on to say that the Union Exhibit #5 is identical to article 34 of the Agreement except the phrase "as soon as possible" refers to the Toledo Yard. Union Exhibit #7, said Cooper, was submitted on 1/27/79 and was ratified by the Chicago and Toledo Yards and rejected by the Lorain Yard. Mr. Cooper made brief comments on Union Exhibits #8-#12 and said Union Exhibit #13 is identical to the Agreement and is, in addition, similar to Union Exhibit #1.

The Union also cross examined Mr. Stan Lepkowski, who acknowledged he was not involved in all negotiations and said he was not sure if he was present when the Union submitted its pension proposals, but he was aware of all economic demands. Mr. Lepkowski said the Company had put a limit on total pension costs and he agreed that the Company proposals covered all of article 34. He asserted that the Company maintained that pension contributions should be based on hours worked and that "and/or paid" phrase was to accommodate holidays and vacations. Lepkowski testified that actual hours worked was discussed at the table and these discussions were included in the Company's total pension cost calculations.

Mr. Lepkowski said the Company made pension contributions for hours not worked by employees on holidays or vacations but not for funeral leave since we could not predict these hours.

In closing, the Union argues that the Company is attempting to achieve in arbitration what it could not obtain in negotiations. Article 34 contains clear language and that "and/or" is equivalent to "either/or" and therefore the Union claims the Company is violating the Agreement by not making pension contributions for hours paid.

The Union asks that its grievance be sustained and that this award be retroactive to the date the employees returned to work. It also asks that the Arbitrator retain jurisdiction until the Award is implemented.

B) *Company:* The Company's witness, Mr. Stan Lepkowski, testified he participated in most all of the negotiations leading up to the present Agreement. He stated that he generated the cost data on Article 34 and he said that since 1961 the Pension Fund had been actuarial funded plan administered by the Company. The Union, continued Lepkowski, wanted to transfer the fund to the Boilermaker's Trust Plan and have the International administer it in Kansas City.

Lepkowski said he arrived at the hourly contribution of $.2486/hour by dividing the annual cost of the old plan per employee by 1705 hours. He went on to say that the Company tried to make the contributions on hours worked only but that the Union had problems with vacations and holidays. The final figure of $.25/hour worked and/or paid, said Lepkowski, was jointly determined so as to not to increase annual pension costs. The words "and/or" contained in Article 34, said Lepkowski, were designed to cover holidays and vacations, but not funerals since funeral leave is not predictable.

The Company also cross examined the Union witness. Mr. Cooper testified that he was not at every negotiations session and therefore had no specific knowledge of the submission dates of Union Exhibits #1-12. He went on to say that pension contributions should be paid on hours paid. Thus, the pension calculation for a 12 hour day comprising 8 hours at straight time plus 4 hours at time and one-half should be 14 hours x $.25/hour. Mr. Cooper did not answer the Company's next question which was: "What then, is the meaning of hours worked?" He did say that he was not

sure that the words, "hours worked" in article 34 were necessary.

Mr. Cooper agreed that the language of article 34 speaks for itself and that the phrase "actual hours worked and/or paid" is simply standard union contract language. However, Mr. Cooper agreed that the last portion of the above phrase, "and/or paid", is intended to accommodate pension contributions for vacation and holiday hours. Mr. Cooper also acknowledged that if there were no "/or paid" in the phrase, there would be no pension contribution for holiday or vacation hours.

Mr. Cooper said the Union did not exactly agree with the Company's premise that the pension costs should remain constant.

In closing, the Company argues that the Union did not prove its allegation that the Company violated article 34. Moreover, the Union never raised the issue of funeral leave.

The Company argues that the logical extension of the Union's position is that the Company pay $.25/hour for all hours paid and therefore, there would be no need for the words "actual hours worked". The Company states it agreed with the Union's pension plan changes while the Union agreed to keep costs constant.

The Company acknowledged that its position on contributions for funeral leave are less clear, but it does insist that the Company's intent, which was well known by the Union, was to maintain pension costs. Therefore, asserts the Company, its intent must be accepted even though the language does not specifically exclude funeral pay.

Discussion and Award

The major issue is whether pension contributions must be made on the basis of hours paid or hours worked? A minor issue is whether funeral leave is treated as are holidays

and vacations? Let me deal with the major issue first.

Article 34 states, in part, that the Company will make pension contributions:

> . . . on the basis of twenty-five cents (.25¢) per hour for all actual hours worked and/or paid for all employees covered by this Agreement.

What is clearly intended by both parties is that contributions are made for: 1) hours worked, and 2) vacation and holiday hours paid. What is not clear is the contribution for overtime hours.

The Union asserts that such contribution is based on hours paid and the Company asserts it is based on hours worked. The Union's testimony, however, is not persuasive for at least two reasons. First is that overtime pay is calculated in the following way: Number of overtime hours x overtime rate (either 1½ or 2). To be sure 4 hours overtime at 1½ is equivalent to 6 hours at straight time, but the employee actually worked four hours, not six. Second, the phrase "actual hours worked and/or paid" is superfluous and confusing if it really means hours paid. The phrase should read "actual hours paid" for the Union's intent to hold. Therefore, article 34, taken together with the testimony, supports only one conclusion which is that the pension contribution for overtime hours is based on the actual overtime hours worked, not the amount of wage earned and, subsequently, converted into a straight time hour equivalent.

The minor issue is, on the one hand, less complex but, at the same time, much more difficult to answer since there was little testimony on this. The Union contends that the Company should make pension contributions on funeral pay in exactly the same manner it now makes pension contributions on vacation and holiday pay. The Company says deaths are unpredictable and this coupled with the Com-

pany's intent to maintain pension costs forces a conclusion that funeral pay is not covered by the phrase "and/or paid".

The arguments on both sides are weak. The Union's position is a contention. It offered no persuasive evidence that funeral pay was to be treated like vacation and holiday pay with respect to pension contribution. By the same token, the Company's argument that it cannot predict deaths is not particularly persuasive for two reasons. First, past experience on funeral leave would certainly allow some predictability and while it might not be precise, the Company could identify a range of possible hours. Second, the question of inability to predict deaths might be just as valid for overtime hours worked. The latter may be a bit easier to predict than deaths, but it still is somewhat uncertain and as a result, pension costs cannot be predicted to the last dollar simply because the Company cannot predict exact overtime. Therefore, it is necessary to look at additional evidence, however meagre.

The exclusion of funeral pay from the phrase "and/or paid" is an anomaly. That is, it makes no practical sense to think that the Union would demand the inclusion of holiday and vacation pay and leave out funeral pay. The Union alleges that funeral pay should be treated like holiday and vacation pay and the Company asserts that such a decision would increase pension costs. Neither the Union's or the Company's contentions constitute hard evidence but the Union's position is compatible with existing practice with respect to holiday and vacation pay. Moreover, article 9 is entitled *Holiday Pay — Funeral Pay* and it makes little sense to think the Union and Company agreed to contribute to pensions on one and not the other. Moreover, the paucity of evidence and testimony on funeral leave allows the inference that it was not thoroughly discussed in the negotiations. This lack of give and take created a problem which is now resolved.

AWARD

Therefore, funeral pay is ruled to be covered by the phrase ''and/or paid'' in article 34 and pension contributions for funeral pay are to take effect upon receipt of this award.

Given this award, there is no reason for the Arbitrator to retain jurisdiction.

No. 82-1860-CFX
Status: GRANTED

Title: Schneider Moving & Storage Company, Petitioner
v.
Loran W. Robbins, et al.

Docketed:
May 17, 1983

Court: United States Court of Appeals
for the Eighth Circuit

Vide:
82-1862

Counsel for petitioner: Yates, David F., Bobinette, Charles W.

Counsel for respondent: Luplow, Russell N.

Entry	Date	Note	Proceedings and Orders
1	May 17 1983	G	Petition for writ of certiorari filed.
3	May 20 1983		Order extending time to file response to petition until July 7, 1983.
4	Jul 6 1983		Brief of respondents in opposition filed. VIDED.
5	Jul 6 1983		DISTRIBUTED. September 26, 1983
7	Oct 3 1983		Petition GRANTED. The case is consolidated with 82-1862 and a total of one hour is allotted for oral argument.
			**********
9	Nov 17 1983		Order extending time to file brief of petitioner on the merits until November 22, 1983.
10	Nov 21 1983		Brief amicus curiae of Merchants and Manufacturers Assn., et al. filed. VIDED.
11	Nov 17 1983		Brief of petitioner Schneider Moving & Storage filed. VIDED.
12	Nov 17 1983		Joint appendix filed. VIDED.
13	Nov 22 1983		Brief of petitioner Prosser's Moving and Storage Co. filed. VIDED.
14	Dec 5 1983	G	Motion of petitioner in No. 82-1860 for divided argument filed.
16	Dec 1 1983		Order extending time to file brief of respondent on the merits until January 13, 1984.
17	Dec 7 1983	G	Motion of petitioner in No. 82-1862 for divided argument filed.
19	Dec 12 1983		Motion of petitioner in No. 82-1860 for divided argument GRANTED.
20	Dec 12 1983		Motion of petitioner in No. 82-1862 for divided argument GRANTED.
21	Dec 12 1983		The requests for additional time for oral argument are denied.
22	Jan 4 1984		Leave to exceed the page limits on respondents' brief on the merits filed with Justice Blackmun (A-532).
23	Jan 5 1984		Order granting same not to exceed 65 pages by Justice Blackmun.
24	Jan 9 1984		Record filed.
25	Jan 9 1984		Certified original record & C.A. proceedings, 4 volumes received.
26	Jan 9 1984		SET FOR ARGUMENT. Tuesday, February 21, 1984. This case is consolidated with No. 82-1862. (1 hour) (2nd case)
27	Jan 11 1984		Brief of respondents Loren W. Robbins, et al. filed. VIDED.
28	Jan 13 1984		Brief amicus curiae of AFL-CIO filed. VIDED.
29	Jan 18 1984		CIRCULATED.
30	Feb 14 1984	X	Reply brief of petitioner Prosser's Moving and Storage Company filed. VIDED.

No. 82-1860-CFX

Entry	Date	Note	Proceedings and Orders
31	Feb 14 1984	X	Reply brief of petitioner Schneider Moving & Storage filed.
			VIDED.
32	Feb 21 1984		ARGUED.